Message

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Sent: 8/13/2018 9:16:54 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Leopold, Matt (OGC) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]
Subject: AFBF Comments re: WOTUS and Recodification of Preexisting Rule
Attachments: AFBF SNPRM Comment (SWANCC).pdf; AFBF SNPRM Comment (Technical).pdf

Mr. Leopold and Mr. Ross,

Please see the attached comments filed today by the American Farm Bureau Federation along with several other organizations regarding the definition of "Waters of the United States" and recodification of the preexisting rule. (Docket ID EPA-HQ-OW-2017-0203-15104).

Thank you,

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August 13, 2018

Submitted via regulations.gov

The Honorable Andrew Wheeler
Acting Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: Definition of "Waters of the United States"—Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018)

Dear Acting Administrator Wheeler and Assistant Secretary James:

The undersigned organizations support the Environmental Protection Agency's ("EPA") and the Army Corps of Engineers' ("Corps") proposal to repeal the 2015 Rule Defining Waters of the United States ("2015 Rule"), and many of us are submitting individual comment letters detailing our reasons for supporting the proposal. We write this letter to separately address an issue of particular importance to all of us: the effect of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). As EPA and the Corps move forward with this rulemaking, the agencies must recognize the limitations *SWANCC* imposes on jurisdiction.

In the Supplemental Notice, EPA and the Corps request comment on:

> [W]hether the water features at issue in *SWANCC* or other similar water features could be deemed jurisdictional under the 2015 Rule, and whether such a determination is **consistent with or otherwise well-within the agencies' statutory authority, would be unreasonable or go beyond the scope of the CWA, and is consistent with Justice Kennedy's significant nexus test** expounded in *Rapanos* wherein he stated, '[b]ecause such a [significant] nexus was lacking with respect to isolated ponds, the [*SWANCC*] Court held that the plain text of the statute did not permit' the Corps to assert jurisdiction over them.

83 Fed. Reg. at 32,249 (quoting *Rapanos v. United States*, 547 U.S. 715, 767 (2006)) (emphasis added).

This request for comment warrants special attention because the assertion of jurisdiction over the isolated ponds at issue in *SWANCC* or other similar water features—under the 2015 Rule's theory of what constitutes a significant nexus or any other theory—is incompatible with the statutory text and Supreme Court precedent.

In *SWANCC*, the Supreme Court "read the statute as written" to hold that the Clean Water Act ("CWA") would not allow the assertion of jurisdiction over nonnavigable, isolated, intrastate

ponds located in northern Illinois. 531 U.S. at 174. The Court began its analysis by citing two key elements of the statutory text: *first*, Congress's choice to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority . . .", *id.* at 167 (quoting 33 U.S.C. § 1251(b)) and, *second*, the statute's key jurisdictional term—"navigable waters," defined to mean "the waters of the United States." 531 U.S. at 166, 167. Construing these provisions in light of its prior decision in *Riverside Bayview*, the Court held that "the text of the statute will not allow [the Court] to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water." *Id.* at 168. To hold otherwise would effectively read the term "navigable" out of the Act and strip it of any independent significance. *See id.* at 171-72.

The Court acknowledged its statements in *Riverside Bayview* that the term "navigable" was of "limited import" and that Congress intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC*, 531 U.S. at 167 (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985)). But "it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172. Its holding in *Riverside Bayview*, the Court explained, was based on "Congress's unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands inseparably bound up with the 'waters' of the United States." *SWANCC*, 531 U.S. at 167, 172 (quoting *Riverside Bayview*, 474 U.S. at 133, 135-39).

The *SWANCC* court also considered the government's arguments based on legislative history and prior regulatory interpretations but found them unavailing. Among other things, it rejected the assertion that the 1977 legislative history indicates "that Congress recognized and accepted a broad definition of 'navigable waters' that includes nonnavigable, isolated, intrastate waters." 531 U.S. at 169. Government counsel at oral argument had conceded that a ruling upholding CWA jurisdiction over the *SWANCC* ponds would "assume that 'the use of the word navigable in the statute . . . does not have any independent significance." *Id.* at 172. But this was a bridge too far. The Court explained that the term "navigable waters" and the legislative history indicate that when Congress passed the CWA it was exercising its commerce power over navigation and had in mind its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 168 n.3, 172. Because the jurisdictional claim in *SWANCC* would "read the term 'navigable waters' out of the statute," it exceeded the Corps' CWA authority. *Id.* at 172.

Not only did *SWANCC* emphasize the importance of the term "navigable" in the CWA's text, it explicitly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause allows. *See* 531 U.S. at 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)). Responding to the government's argument that its jurisdictional claims could be upheld based on "Congress's power to regulate intrastate activities that 'substantially affect' interstate commerce," *SWANCC*, 531 U.S. at 173, the Court noted that allowing the government to "claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use. Such an interpretation, pushing the limits of Congressional authority, could only be upheld if there were "a clear statement from Congress that it intended such a result." *Id.* at 174.

"Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." *Id.* (quoting 33 U.S.C. § 1251(b)). Consequently, the Court "read the statue as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject[ed] the request for administrative deference." *SWANCC*, 531 U.S. at 174.

The holding in *SWANCC* is not limited to the particular isolated, intrastate water features or the Migratory Bird Rule that were before the Court. Rather, it applies with equal force to any interpretation of CWA jurisdiction. In adopting a rule to define the "waters of the United States," the Agencies must give independent significance to the term "navigable" as Congress intended and respect the limits of federal authority that flow from Congress's explicit choice to preserve and protect the States' traditional and primary authority over land and water use. A core holding in *SWANCC* is that, absent a clear statement of Congressional intent, the CWA must be construed to avoid federal intrusion into State authority over land and water use. The assertion of jurisdiction over the very ponds at issue in *SWANCC* under some alternative theory would be incompatible with that holding. Thus, *SWANCC* does not allow for that. Neither does Justice Kennedy's concurrence in *Rapanos*. Reaffirming the holding in *SWANCC*, Justice Kennedy explained that the plain text of the CWA did not permit the Corps to assert jurisdiction over waters "that were isolated in the sense of being unconnected to other waters covered by the Act" and hence, lacked the sort of significant nexus to navigable waters that informed the Court's reading of the Act in *Riverside Bayview*. 547 U.S. at 766-67; *see also id.* at 779, 781-82, 784-85 (emphasizing that the significant nexus must be to navigable waters "in the traditional sense" or "as traditionally understood").

In short, any attempt to reassert jurisdiction over the *SWANCC* ponds and comparable water features would violate the plain text of the CWA, be contrary to Supreme Court jurisprudence construing the Act, impermissibly intrude on the states' traditional and primary authority over land and water use, and raise serious constitutional and federalism questions.

* * *

The undersigned organizations urge the agencies to finalize the proposed repeal of the 2015 Rule. As part of that rulemaking process, the agencies should recognize the breadth and import of the Court's holdings and rationales in *SWANCC* and avoid asserting CWA jurisdiction in any manner that contravenes that precedent.

American Farm Bureau Federation
Agri-Mark, Inc.
Agricultural Retailers Association
AKSARBEN Club Managers Association
American Dairy Coalition
American Exploration & Mining Association
American Exploration & Production Council
American Mosquito Control Association
American Petroleum Institute

American Public Power Association
American Sugar Cane League
American Sugarbeet Growers Association
Americans for Prosperity
Aquatic Plant Management Society
Arizona Cotton Growers Association
Arizona Farm Bureau Federation
Arizona Pork Council
Associated Builders and Contractors
Associated General Contractors of America
Association of General Contractors – Nebraska Chapter
California Citrus Quality Council
California Farm Bureau Federation
California Specialty Crops Council
Campaign for Liberty
Colorado Farm Bureau
Competitive Enterprise Institute
Council of Producers and Distributors of Agrotechnology
CropLife America
Dairy Producers of New Mexico
Dairy Producers of Utah
Edison Electric Institute
Exotic Wildlife Association
Farm Credit Services of America
Florida Farm Bureau Federation
FreedomWorks
Global Gold Chain Alliance
Golf Course Superintendents Association
GROWMARK, Inc.
Idaho Dairymen's Association
Idaho Farm Bureau Federation
Illinois Farm Bureau
Independent Petroleum Association of America
Independent Women's Forum
Industrial Minerals Association – North America
Iowa Farm Bureau Federation
Iowa-Nebraska Equipment Dealers Association
Kansas Farm Bureau
Michigan Farm Bureau
Minnesota Agricultural Water Resource Center
Minnesota Farm Bureau Federation
Mississippi Farm Bureau Federation
Missouri Dairy Association
Montana Farm Bureau Federation
National Alliance of Forest Owners

National Alliance of Independent Crop Consultants
National Association of Home Builders
National Association of Landscape Professionals
National Association of Manufacturers
National Association of State Departments of Agriculture
National Association of Wheat Growers
National Cattlemen's Beef Association
National Chicken Council
National Club Association
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Federation of Independent Businesses/Nebraska
National Industrial Sand Association
National Milk Producers Federation
National Mining Association
National Onion Association
National Pork Producers Council
National Ready Mixed Concrete Association
National Renderers Association
National Sorghum Producers
National Stone, Sand & Gravel Association
National Turkey Federation
Nebraska Agribusiness Association
Nebraska Association of County Officials
Nebraska Association of Resource Districts
Nebraska Bankers Association
Nebraska Cattlemen
Nebraska Chamber of Commerce and Industry
Nebraska Cooperative Council
Nebraska Corn Board
Nebraska Corn Growers Association
Nebraska Farm Bureau Federation
Nebraska Golf Course Managers Association
Nebraska Grain and Feed Association
Nebraska Grain Sorghum Association
Nebraska Pork Producers Association
Nebraska Poultry Industries
Nebraska Rural Electric Association
Nebraska Soybean Association
Nebraska State Dairy Association
Nebraska State Home Builders Association
Nebraska State Irrigation Association
Nebraska Water Resources Association
Nebraska Wheat Growers Association

Nemaha Natural Resources District
Nevada Farm Bureau Federation
New York Farm Bureau
North Carolina Farm Bureau
North Central Weed Science Society of America
Northeast Dairy Farmers Cooperatives
Northeastern Weed Science Society
Ohio AgriBusiness Association
Oklahoma Farm Bureau
Oregon Dairy Farmers Association
Pawnee County Rural Water District #1
Pennsylvania Farm Bureau
Professional Dairy Managers of Pennsylvania
Responsible Industry for a Sound Environment
South Dakota Agri-Business Association
Southern Weed Science Society
St. Albans Cooperative Creamery
Taxpayers Protection Alliance
Texas Association of Dairymen
Texas Cattle Feeders Association
Texas Wildlife Association
The Fertilizer Institute
The Society of American Florists
The Utility Water Act Group
Treated Wood Council
U.S. Chamber of Commerce
United Dairymen of Arizona
United Egg Producers
United States Cattlemen's Association
Upstate Niagara Cooperative, Inc.
U.S. Poultry & Egg Association
USA Rice
Virginia Agribusiness Council
Virginia Farm Bureau Federation
Virginia Poultry Federation
Washington State Dairy Federation
Weed Science Society of America
Western Society of Weed Science
Wyoming Ag-Business Association
Wyoming Farm Bureau Federation

CC: Matthew Z. Leopold, General Counsel, U.S. Environmental Protection Agency
David Ross, Assistant Administrator for the Office of Water, U.S. Environmental Protection Agency

August 13, 2018

Submitted via www.regulations.gov

The Honorable Andrew Wheeler
Acting Administrator
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1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable R.D. James
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
108 Army Pentagon
Washington, DC 20310

EPA-HQ-OW-2017-0203

Re: Definition of "Waters of the United States"—Recodification of Preexisting Rule; Supplemental Notice of Proposed Rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018)

Dear Acting Administrator Wheeler and Assistant Secretary James:

The undersigned agricultural organizations appreciate the opportunity to provide additional comments on the U.S. Environmental Protection Agency's (EPA) and U.S. Army Corps of Engineers' (Corps) supplemental notice of proposed rulemaking, "Definition of 'Waters of the United States' – Recodification of Existing Rule," published at 83 Fed. Reg. 32,227 on July 12, 2018. Most of the undersigned organizations previously submitted comments in support of the Agencies' July 27, 2017, proposal[1] to repeal the 2015 rule defining "waters of the United States"[2] (hereinafter, "2015 Rule"). In these comments, we provide additional detailed reasons why we believe the Agencies should finalize their pending proposal to permanently repeal the 2015 Rule.

The undersigned organizations, or their members, own, operate, or have an interest in lands and facilities that produce or contribute to the production of the row crops, [forests,] livestock, and poultry that provide safe and affordable food, fiber, and fuel to Americans all across the United States. We and our members represent, own and operate facilities that are water-dependent enterprises. For that reason, we have a strong interest in protecting and restoring the Nation's wetlands and waters. Given the broad array of potentially jurisdictional water features that exist on the Nation's farm, ranch, and [forest] lands, clarity, predictability, and consistency is of the essence. Farmers, ranchers, and [foresters] need to know what features on their lands are subject to federal jurisdiction under the Clean Water Act (CWA) and, by extension, whether their day-to-day activities are lawful.

[1] 82 Fed. Reg. 34, 899 (July 27, 2017).
[2] 80 Fed. Reg. 37,054 (June 29, 2015).

The undersigned organizations remain concerned that the 2015 Rule expanded CWA jurisdiction well beyond the limits that Congress established, as interpreted and recognized by the Supreme Court. This unprecedented expansion readjusted the federal-state balance and, contrary to Congress's stated policy in the CWA, failed to recognize, preserve, and protect the states' traditional and primary authority over land and water use. Equally important, the 2015 Rule fell woefully short of meeting its stated objective of providing clarity and certainty regarding the scope of the CWA. Just the opposite, the rule is so unclear in its scope as to be unconstitutional. In particular, the Rule's definitions and discussions of certain key terms and concepts are vague in a way that violates the Fifth Amendment's Due Process Clause, while its purported scope improperly treads on the States' traditional prerogatives and violates the Commerce Clause because, to put it simply, there is nothing commercial about it.

These are not the only reasons for repealing the 2015 Rule, but they are more than sufficient to justify doing so. If the Agencies repeal the Rule, it will be replaced by the regulatory definitions that preceded it. Those preexisting regulations are far from perfect, and the undersigned organizations urge the Agencies to continue to engage stakeholders and develop a workable definition of WOTUS—one that not only respects the limits Congress placed on the CWA's scope, but that also takes account of the realities facing ordinary landowners. As an interim measure, however, reinstatement of the pre-2015 regulatory framework for defining "waters of the United States" is certainly preferable to the confusion and overreach that would result should the 2015 Rule become applicable in any states.

I. Legal Background

The CWA establishes multiple programs that, together, are designed to achieve the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] Among other things, the Act envisions that states will address water pollution through a variety of programs, funding, grants, research, training and many other measures, with differing levels of federal involvement. One of the Act's main provisions is Section 301(a), which prohibits the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source," except "in compliance with" other provisions of the Act.[4] Notably, this discharge prohibition and the regulatory permitting programs in the Act (*e.g.*, Sections 402 and 404) apply only to discharge[s] of pollutants"[5] to "navigable waters,"[6] as opposed to all "pollution"[7] of the "Nation's waters." That is not to say the Act leaves the rest of the nation's waters unprotected. Rather, Congress expressly "recognize[d]" and sought to "preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution" and "plan the development and use" of "land and water resources"[8] and thus, Congress left States and localities responsible for protecting all waters (including groundwater) and wetlands that are not "navigable waters." The distinction between navigable waters and the rest of the nation's waters is critically important: every expansion of federal

[3] 33 U.S.C. 1251(a).
[4] *Id.* §§ 1311(a), 1362(12).
[5] *Id.* § 1362(12).
[6] *Id.* § 1362(7).
[7] *Id.* § 1362(19).
[8] *Id.* § 1251(b).

jurisdiction—*e.g.*, by broadly interpreting the term "navigable waters" in pursuit of the 101(a) objective—readjusts the federal-state balance that Congress struck in the Act.[9]

In 1977, the Corps defined "waters of the United States" to include not only traditional navigable waters, but also "adjacent wetlands" and "[a]ll other waters" the "degradation or destruction of which could affect interstate commerce."[10] Even though the text of the regulations remained largely unchanged for over three decades, the Agencies' interpretation and application of those regulations steadily expanded over time. On three separate occasions, the Supreme Court had to weigh in to address the government's efforts to bring more waters under federal jurisdiction.

First, in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Court addressed the question of whether non-navigable wetlands constitute "waters of the United States" where they are "adjacent to" navigable-in-fact waters and "inseparably bound up with" them because of their "significant effects on water quality and the aquatic ecosystem."[11] Finding that Congress intended the CWA "to regulate at least *some* waters that would not be deemed 'navigable,'" the Court held that it is "a permissible interpretation of the Act" to conclude that "a wetland that *actually abuts on* a navigable waterway" fits within the "definition of 'waters of the United States.'"[12] Notably, the Court's holding was based heavily on the fact that Congress unquestionably acquiesced to, and approved of, the Corps' regulations interpreting the CWA to encompass wetlands adjacent to navigable waters.[13]

Second, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court struck down the Migratory Bird Rule, which the Agencies used to assert jurisdiction over various features that bore little or no relation to traditional navigable waters. In that case, the Corps claimed jurisdiction over isolated "seasonally ponded, abandoned gravel mining depressions" because they were "used as habitat by [migratory] birds."[14] The Supreme Court explained that, "to rule for [the agency], we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water," but "the text of the statute will not allow this."[15] To hold otherwise would effectively read the term "navigable" out of the Act and strip it of any independent significance.[16] The *SWANCC* court also held that allowing the government to "claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use," all without anything "approaching a clear statement from Congress that it intended" such a result."[17] "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to

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[9] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001) (*SWANCC*).
[10] 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).
[11] 474 U.S. at 131-135 & n.9.
[12] *Id.* at 133, 135 (emphasis added).
[13] *Id.* at 135-39 (discussing 1977 CWA amendments and legislative history).
[14] 531 U.S. at 162-65 (quoting 51 Fed. Reg. 41,217 (Nov. 13, 1986)).
[15] *SWANCC*, 531 U.S. at 168.
[16] *See id.* at 171-72.
[17] *Id.* at 174.

'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."[18]

Finally, in *Rapanos*, the Court dealt with the Corps' assertions of jurisdiction over sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water."[19] The Corps viewed those sites as adjacent wetlands because they were "near ditches or man-made drains that eventually empty into traditional navigable waters."[20] Justice Scalia, writing for a four-Justice plurality, rejected the Corps' position, holding that "waters of the United States" include "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[21] By treating "ephemeral streams" and "dry arroyos" as jurisdictional, the agencies had stretched the text of the CWA "beyond parody" to mean "'Land is Waters.'"[22] Moreover, under the plurality opinion, wetlands are jurisdictional based on adjacency "*only* [if they have] a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[23] "[A]n intermittent, physically remote connection" to navigable waters is not enough under either *Riverside Bayview* or *SWANCC*.[24]

Justice Kennedy concurred in the judgment in *Rapanos*. In his opinion, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[25] When "wetlands' effects on water quality [of traditional navigable waters] are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[26] While Justice Kennedy left open the possibility that this test "*may*" allow for the assertion of jurisdiction over a wetland abutting a major tributary to a traditional navigable water, he categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" would satisfy his test for significant nexus.[27] He further suggested that any agency regulation identifying which tributaries are jurisdictional would need to rest on considerations including "volume of flow" and "proximity to navigable waters" "significant enough" to provide "assurance" that they and "wetlands adjacent to them" perform "important functions for an aquatic system incorporating navigable waters."[28]

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[18] *Id.* (quoting 33 U.S.C. § 1251(b)).
[19] 547 U.S. at 720-21.
[20] *Id.* at 729.
[21] *Rapanos*, 547 U.S. at 732, 739.
[22] *Id.* at 734.
[23] *Id.* at 742.
[24] *Id.*
[25] *Id.* at 779.
[26] *Id.* at 780.
[27] *Id.* at 781; *see also id.* at 778 (Act does not reach wetlands alongside "a ditch or drain" that is "remote or insubstantial" just because it "eventually may flow into traditional navigable waters").
[28] *Id.* at 781.

II. The Agencies Have Ample Legal Justification for Repealing the 2015 Rule.

The Agencies are rightly concerned that the "2015 Rule lacks sufficient statutory basis."[29] As discussed in the supplemental notice, the 2015 Rule stretches the "significant nexus" concept so far as to be inconsistent with Justice Kennedy's concurring opinion in *Rapanos*, and that fundamental defect justifies repeal given that "significant nexus" is the backbone of the 2015 Rule's expansion of jurisdiction over tributaries (as newly defined), adjacent waters and wetlands, and various other waters.[30] But that is just the tip of the iceberg. As explained in the following sections, there are many more reasons why the Agencies should repeal the 2015 Rule.

A. The 2015 Rule Improperly Treats Justice Kennedy's Concurring Opinion in *Rapanos* as Controlling.

The 2015 Rule characterized Justice Kennedy's "significant nexus" test for what constitutes jurisdictional wetlands "as the touchstone" for CWA jurisdiction and then applied it "to other categories of water bodies."[31] But Justice Kennedy's opinion, which no other justice joined, was not the holding of *Rapanos*. Because the 2015 Rule is based explicitly on that opinion, it is unlawful and must be repealed.

Courts have struggled with how to interpret the 4-1-4 decision in *Rapanos* given that no rationale supporting the judgment enjoyed support from a majority of the Justices. The Supreme Court's decision in *Marks v. United States* provides some guidance on interpreting fractured decisions such as *Rapanos*.[32] There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[33] But this holding has been of limited help in interpreting *Rapanos*, because neither the plurality opinion nor Justice Kennedy's concurrence is a logical subset of the other.[34]

Simply put, "there is quite little common ground between Justice Kennedy's and the plurality's conceptions of jurisdiction under the Act, and both flatly reject the other's views."[35] Faced with this dilemma, when crafting the 2015 Rule (or any future definition of "waters of the United States"), the Agencies had several options to choose from in determining the scope of the "waters of the United States":

Waters must satisfy both the plurality and Justice Kennedy's opinions. Under this approach, only those waters that satisfy both opinions would be jurisdictional because that is the

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[29] 83 Fed. Reg. at 32,238.
[30] *See id.* at 32,240-42.
[31] *See* 79 Fed. Reg. at 22,192.
[32] 430 U.S. 188 (1977).
[33] *Id.* at 193.
[34] *See United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009) (explaining how the search for the "narrowest opinion" in *Rapanos* that "relies on the least doctrinally far-reaching common ground" "breaks down" in the *Rapanos* context because neither opinion is a "logical subset" of the other); *see also Nichols v. United States* 511 U.S. 738, 745 (1994) (declining to apply *Marks* because "[a] number of Courts of Appeals have decided there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding").
[35] *Cundiff*, 555 F.3d at 210.

narrowest "position" taken by the opinions, read together, of the Justices who concurred in the judgment. *Rapanos* would therefore require that: (i) jurisdictional waters have a relatively permanent flow that reaches traditional navigable water; (ii) wetlands have a continuous surface connection to navigable waters; and (iii) the flow or connection must be sufficient in frequency, duration, and proximity to affect the chemical, physical, and biological integrity of covered waters.

Waters must satisfy points of agreement between the two opinions. The five Justices who concurred in the judgment in *Rapanos* shared the same view on some important issues. For instance, both opinions held that "the word 'navigable' in 'navigable waters [must] be given some importance."[36] Both opinions also agree that the term "navigable waters" encompasses some waters and wetlands that are not navigable-in-fact but that have a substantial connection to navigable waters.[37] Finally, both opinions agree that "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less the waters or "wetlands [that] lie alongside [such] a ditch or drain."[38] Under this approach, the foregoing are the controlling holdings of *Rapanos* that bind the Agencies.

Treat the majority opinions as persuasive authority. Under this approach, the plurality and Kennedy opinions would be deemed persuasive authority that must be considered in conjunction with other binding precedent such as *SWANCC* and *Riverside Bayview*. Neither the plurality nor the Kennedy opinion, by itself, would be deemed to have superseded any of the authoritative holdings in either of those earlier cases. Nor would either opinion be treated as controlling.

Had the Agencies taken any of these three approaches, the 2015 Rule would have been compatible with *Marks*. What the Agencies could not do, however, was to proclaim that waters that satisfy only Justice Kennedy's concurring opinion are jurisdictional. That opinion clearly is not the narrowest reading of the *Rapanos* majority opinions. Nor is it permissible to conclude that "waters of the United States" are those waters that meet either the plurality or the Kennedy opinion. Such a conclusion ignores the principle in *Marks* that the holding of the Supreme Court is the "position taken by those Members who concurred in the judgments on the narrowest grounds."[39] Because the 2015 Rule was based on the faulty legal premise that Justice Kennedy's opinion is the "touchstone" of jurisdiction, it must be repealed.

One final point deserves mention. Amidst all of the confusion over how to apply *Marks* to interpret the *Rapanos* decision, at least one thing is clear: dissenting opinions are not entitled to any weight. As the Supreme Court explained in *O'Dell v. Netherland*, *Marks* requires a court to identify "the narrowest grounds of decision among the Justices *whose votes were necessary to the judgment*."[40] Courts of appeals have similarly interpreted *Marks* to mean that dissenting opinions carry no precedential value. The Sixth Circuit explained that *Marks* "instruct[ed] lower

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[36] *Rapanos*, 547 U.S. at 778 (Kennedy); *id.* at 731 (plurality).
[37] *See* 547 U.S. at 739, 742 (plurality); *id.* at 784-85 (Kennedy).
[38] *Id.* at 781 (Kennedy); 733-34 (plurality).
[39] *Id.* at 193.
[40] 521 U.S. 151, 160 (1997) (emphasis added).

courts . . . to ignore dissents."[41] Likewise, the Ninth Circuit recently proclaimed that "the dissent that did not support the judgment is out."[42] And the Seventh Circuit cautioned that "under *Marks*, the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions."[43] To sum up, in the words of the D.C. Circuit sitting *en banc*,[44] courts cannot "combine a dissent with a concurrence to form a *Marks* majority."

Despite these holdings, the 2015 Rule improperly looked to the *Rapanos* dissent for support. For example, the Technical Support Document (at 51) makes no secret that the agencies looked "to the votes of the dissenting Justices" to stitch together "a majority view."[45] And to support its adoption of Justice Kennedy's "significant nexus" test over the plurality view, the final rule cites the *Rapanos* dissent as support for the notion that the Agencies were free to follow either the plurality or the concurring opinion.[46] For these reasons, the 2015 Rule's reliance on the *Rapanos* dissent was unlawful.

B. The 2015 Rule Exceeds the Agencies' CWA Authority and is Contrary to Supreme Court Precedent and Science.

1. The Rule reads the term "navigable" out of the CWA.

The CWA grants the Agencies jurisdiction over "navigable waters," which are defined as "the waters of the United States."[47] In *SWANCC*, the Supreme Court explained that "Congress' separate definitional use of the phrase 'waters of the United States' [does not] constitute[] a basis for reading the term 'navigable waters' out of the statute."[48] While the Court acknowledged its prior statement in *Riverside Bayview* that "the word 'navigable' in the statute" may have "limited effect," it clarified in *SWANCC* that the word "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[49] The Court also found nothing in the legislative history that "signifies that Congress intended to exert anything more than its commerce power over navigation."[50]

In *Rapanos*, both the plurality opinion and Justice Kennedy's concurrence again recognized the need to give the term "navigable" some effect.[51] Justice Kennedy, in particular, stated that "the word 'navigable'" must "be given some importance," and he emphasized that if jurisdiction over wetlands is to be based on a "significant nexus" test, the nexus must be to "navigable waters *in the traditional sense*."[52] For that reason, the CWA cannot be understood to

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[41] *Cundiff*, 555 F.3d at 208.
[42] *United States v. Robertson*, 875 F.3d 1281, 1292 (9th Cir. 2017).
[43] *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014).
[44] *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc).
[45] *See also* 79 Fed. Reg. at 22,260 (endorsing the dissent's view of adjacency).
[46] *See* 80 Fed. Reg. at 37,061.
[47] *See* 33 U.S.C. §§ 1311(a), 1362(12).
[48] 531 U.S. at 172.
[49] *Id.* at 172-73 (citing *Riverside Bayview*, 474 U.S. at 133).
[50] *Id.* at 168 n.3.
[51] 547 U.S. at 734-35 (plurality); *id.* at 778-79.
[52] *Id.* at 778-79.

"permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters."[53]

The 2015 Rule flouts these important precedents. It asserts federal jurisdiction over a wide variety of normally dry land features (as "tributaries") and nearby isolated water features (as "adjacent" or case-by-case "significant nexus" waters). Such water features are not navigable in any sense of the word and cannot reasonably be so made. And many of the features that would be jurisdictional under the rule bear no relationship to any navigable water and do not abut or contribute flow to any navigable water. By subjecting these sorts of water features to federal jurisdiction, the 2015 Rule impermissibly reads the term "navigable" out of the CWA.

Perhaps the most obvious examples of how the 2015 Rule ignores the statutory text are the "seasonally ponded, abandoned gravel mining depressions" that were at issue in *SWANCC*.[54] A majority of the Supreme Court agreed that those "nonnavigable, isolated, intrastate waters" are not within the scope of federal jurisdiction under the CWA;[55] yet the very same features could be jurisdictional under the 2015 Rule. Those depressions are within 4,000 feet of Poplar Creek, a tributary to the navigable Fox River. And there can be little doubt that the Corps would find the existence of a significant nexus to the Fox River because the depressions retain water and may have the ability to store runoff or contribute other ecological functions in the watershed.[56] The 2015 Rule's expansive view of "significant nexus" would therefore improperly gut the holding in *SWANCC* by doing exactly what the Court held was unlawful: read the term "navigable" out of the text and open the door to a significant impingement upon the States' traditional and primary authority over land and water use without a clear statement authorizing such a readjustment of the federal-state balance.[57] Thus, the Agencies must repeal the rule.

2. The 2015 Rule's overbroad definition of "tributaries" finds no support in law or science.

The 2015 Rule introduced a new definition of "tributary" that was among the most expansive and problematic terms in the rule. The rule defined "tributary" to mean any feature contributing any minimal amount of flow to a category (1)-(3) water, "either directly or through another water," and "characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark."[58] Under this definition, ephemeral drainages, minor creek beds, and other features that are dry for months, years, or even decades can be jurisdictional so long as they exhibit physical indicators of a bed, banks, and an ordinary high water mark. Features can be jurisdictional as tributaries even if they pass "through any number of [non-jurisdictional] downstream waters" or natural or man-made physical interruptions (*e.g.*, culverts, dams, debris

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[53] *Id.* at 778.
[54] 531 U.S. at 164.
[55] *Id.* at 169; *see also Rapanos*, 547 U.S. at 767 (Kennedy) (concluding that "[b]ecause such a [significant] nexus was lacking with respect to isolated ponds, the [*SWANCC*] Court held that the plain text of the statute did not permit" the assertion of jurisdiction over them).
[56] *See* 83 Fed. Reg. at 32,249.
[57] *See* 531 U.S. at 171-74.
[58] 33 C.F.R. § 328.3(c)(3); *see also* 80 Fed. Reg. at 37,076 (stating that flow can be "intermittent or ephemeral").

piles, boulder fields, or underground features) *of any length*, so long as a bed, banks, and ordinary high water mark can be identified upstream of the break.[59]

To make matters worse, under the 2015 Rule, regulators could conclusively establish the presence of both "waters" and "physical indicators of a bed and banks and ordinary high water" using desktop tools.[60] Specifically, the Agencies can rely on "[o]ther evidence, besides direct field observation," such as "remote sensing or mapping information," including "USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Services (NRCS) Soil Surveys, and State or local stream maps, as well as the analysis of aerial photographs, and light detection and ranging (also known as LIDAR) data, and desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling."[61] And in establishing the presence of tributaries, the Agencies may use historical information alone. The preamble to the 2015 Rule asserted that where remote sensing and other desktop tools indicate a prior existence of a bed, banks, and an ordinary high water mark, that is enough to establish jurisdiction, even if those features do not even exist on the landscape today.[62]

The 2015 Rule's heavy reliance on the ordinary high water mark is extremely problematic. The rule defines ordinary high water mark to mean "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."[63] That is the same definition that Justice Kennedy criticized in *Rapanos* as too uncertain and attenuated to serve as the "determinative measure" for identifying waters of the United States.[64] Because an ordinary high water mark is an uncertain indicator of "volume and regularity of flow," it brings within the Agencies' jurisdiction "remote" features with only "minor" connections to navigable waters—features that "in many cases" are "little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*."[65]

The record confirms that the definition of "tributary" in the 2015 Rule reaches way too far, covering countless miles of previously unregulated features.[66] Not only is the geographic breadth and issue, the rule establishes categorical jurisdiction over many isolated, often dry land features regardless of their distance to navigable waters or whether "their effects on water quality are speculative or insubstantial."[67] Although Justice Kennedy contemplated that it might be permissible for the Agencies to promulgate a rule that "identif[ies] categories of tributaries" (and

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[59] 33 C.F.R. § 328.3(c)(3).
[60] *See* 80 Fed. Reg. at 37,081, 37,098.
[61] *Id.* at 37,076-77.
[62] *Id.* at 37,077.
[63] *Id.* at 37,106.
[64] 547 U.S. at 781.
[65] *Id.* at 781-782 (Kennedy, J.).
[66] *See, e.g.*, NAHB Comments 56-59, 121-123, ID-19574 (JA__) (the Rule will extend jurisdiction over nearly 100,000 miles of intermittent and ephemeral drainages in each of Kansas and Missouri alone); Waters Working Group Comments 27, ID-19529 (JA__) (water supply systems and municipal separate storm sewer systems); Comments of Delta County, Colorado 3, ID-14405 (JA__) ("artificial stock ponds west of the Mississippi").
[67] *Rapanos*, 547 U.S. at 780 (Kennedy).

adjacent wetlands) that, due to "volume of flow," "proximity to navigable waters," and other relevant considerations "are significant enough" to support federal jurisdiction,[68] the 2015 Rule did not do that. Rather than provide for consideration of frequency and volume of flow or proximity to navigable waters, the 2015 Rule proclaims that the presence of "physical indicators" of bed and banks and ordinary high water mark *guarantee* there will be a significant nexus to navigable waters.[69] But those physical indicators do no such thing. To use an example, many ephemeral washes in Maricopa County, Arizona experience flow infrequently, sometimes less than once per year, with each flow event lasting less than five hours. Perhaps not surprisingly, the Corps has previously found that many such washes *do not* have a significant nexus following case-specific analyses, even though these washes often exhibit physical indicators of an ordinary high water mark and therefore would be treated under the 2015 Rule as jurisdictional tributaries.[70]

Not only is the 2015 Rule's definition of "tributary" contrary to law, it also lacks scientific support. As noted above, the rule places heavy emphasis on the ordinary high water mark. According to the technical support document, an ordinary high water mark "forms due to some regularity of flow and does not occur due to extraordinary events."[71] The assumption is that if such a mark is present, a water feature with relatively constant and significant water flow must also be present. This is simply not true. The Agencies made an important concession in promulgating the 2015 Rule: the jurisdictional status of some tributaries—especially "intermittent and ephemeral" features that may not experience flow for months and years at a time—has long been "called into question,"[72] and the evidence of connectivity for such features is "less abundant" than for perennial features in water-rich regions.[73] Once again, the arid West provides an important case study. In that region, erosional features with beds, banks, and ordinary high water marks often reflect one-time, extreme water events, and are not reliable indicators of regular flow.[74] Because rainfall occurs infrequently, and because sandy, lightly-vegetated soils are highly erodible, washes, arroyos, and other erosional features often reflect physical indicators of a bed, banks, and an ordinary high water mark, even though they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow.[75]

Given these conditions, it comes as no surprise that the Corps' studies have found "no direct correlation" between the location of ordinary high water mark indicators and future water flow in arid regions.[76] In fact, such "indicators are distributed randomly throughout the [arid] landscape and are not related to specific channel characteristics."[77] For obvious reasons, "randomly" distributed indicators cannot provide a rational basis for a finding that all features

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[68] *Id.* at 780-81.
[69] *See* 80 Fed. Reg. at 37,076.
[70] *See* City of Scottsdale Comments 2-3.
[71] TSD at 239.
[72] 79 Fed. Reg. at 22,231.
[73] 80 Fed. Reg. at 37,079.
[74] *See* Ariz. Mining Ass'n Comments at 7-11.
[75] *See* Barrick Gold Comments at 15-16.
[76] *See* Ariz. Mining Ass'n Comments 10-11 (quoting U.S. Army Corps of Eng'rs, *Distribution of Ordinary High Water Mark (OHWM) Indicators and Their Reliability* 14 (2006)).
[77] *Id.* at 11 (quoting U.S. Army Corps of Eng'rs, *Survey of OHWM Indicator Distribution Patterns Across Arid West Landscapes* 17 (2013)).

that satisfy the definition of "tributary" automatically meet the "significant nexus" standard set forth in the rule.

The Agencies relied almost exclusively on a case study of the San Pedro River to justify the breadth of the "tributary" definition and its application to arid parts of the country.[78] But that river is *not* representative of arid regions nationwide.[79] Although the Connectivity Report claims that characteristics "similar to the San Pedro River" "have been observed in [three] other southwestern rivers," it candidly acknowledges that each of those systems has *more* flow than the San Pedro.[80] To put things in perspective, the mainstem San Pedro has surface flows 261 days a year because its tributaries generate large storm water runoff, due to unusual soil composition that prevents water loss.[81] By contrast, the Santa Cruz River, which is typical of features in arid parts of the country, has a median annual flow of *zero* cubic feet per second, is dry 90% of the time, and is part of a system of "tributaries" that generally have less frequent surface flow than the mainstem channel, "behave more like deep sandboxes than streams," and lack surface flow or a shallow subsurface connection to groundwater.[82] The Agencies' heavy reliance on the San Pedro consequently overstated the connections between arid channels and downstream navigable waters and was thus arbitrary.

3. The 2015 Rule's definition of "adjacent" is similarly flawed.

The 2015 Rule defines "adjacent" as "bordering, contiguous, or neighboring." The term "neighboring" is defined to include, among other things, (i) waters within 100 feet of the ordinary high water mark of a navigable water or tributary, and (ii) waters within the 100-year floodplain of such a water and within 1,500 feet of its ordinary high water mark.[83] This definition conflicts with Supreme Court precedent and lacks record support.

The Supreme Court has consistently given the term "adjacent" its ordinary meaning in interpreting the CWA. In *Riverside Bayview*, the Court described "wetlands adjacent to [jurisdictional] bodies of water" as wetlands "adjoining" and "actually abut[ting] on" a traditional "navigable waterway."[84] To be jurisdictional, adjacent wetlands must be "inseparably bound up with the 'waters' of the United States" and not meaningfully distinguishable from them.[85] Many years in later in *SWANCC*, the Court rejected the Corps' assertion of jurisdiction over *isolated* non-navigable waters "that [we]re *not* adjacent to open water" and thus not "inseparably bound up" with "navigable waters."[86] Finally, in *Rapanos*, the plurality opinion explained that "[h]owever ambiguous the term may be in the abstract, as we have explained earlier, 'adjacent' as used in *Riverside Bayview* is not ambiguous between 'physically abutting' and merely 'nearby.'"[87] Despite these holdings, the 2015 Rule nevertheless interprets the word

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[78] *See* 79 Fed. Reg. at 22,231-22,232; *see also* Connectivity Report at B-37, B-55.
[79] *See, e.g.*, Southwest Developers Comments 2 (of "1,016 publications" in the Draft Connectivity Report, "only three include research on arid west headwaters in small watersheds").
[80] Connectivity Report B-48 to B-49.
[81] *See* Freeport-McMoRan Comments 6.
[82] *See id.*; Freeport-McMoRan Technical Comments 4, 12-15.
[83] 33 C.F.R. § 328.3(c)(2).
[84] 474 U.S. at 135.
[85] *Id.* at 134-35 & n. 9.
[86] 531 U.S. at 167-68, 171.
[87] 547 U.S. at 748.

"adjacent" to encompass "nearby" waters based on notions of "functional relatedness," rather than physical and geographical proximity, thereby extending the meaning of the word beyond reason.

The 2015 Rule even violates Justice Kennedy's concurring opinion in *Rapanos* by asserting jurisdiction based on adjacency to not just navigable waters in the traditional sense, but also to any category (1) through (5) feature, including "tributaries" with only ephemeral flow. Justice Kennedy, however, plainly rejected the notion that a wetland's mere adjacency to a minor tributary could be "the determinative measure" of whether it was "likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[88] "[W]etlands adjacent to [such] tributaries," Justice Kennedy explained, "might appear little more related to navigable-in-fact waters than were the isolated ponds [in *SWANCC*]."[89] For that reason, Justice Kennedy voted to vacate the agencies' assertion of jurisdiction over wetlands supposedly "adjacent" to a ditch that indirectly fed into a navigable lake.[90] Simply put, "mere adjacency to a tributary of this sort is insufficient."[91] Seemingly ignoring these discussions in Justice Kennedy's opinion, the 2015 Rule categorically asserts jurisdiction over any waters based on their "adjacency" to "tributaries" "however remote and insubstantial,"[92] including ephemeral features, drains, ditches, and streams remote from navigable waters.

Moreover, although the Supreme Court has never allowed such an approach, the 2015 Rule asserts jurisdiction not only on just adjacent "wetlands," but all other adjacent "waters." This novel expansion is unjustified. As the *Rapanos* plurality explained, *non-wetland* "waters"—especially those separated from traditional navigable waters by physical barriers or significant distances—"do not implicate the boundary-drawing problem" that made it appropriate to defer to the Corps' approach to adjacency in *Riverside Bayview*.[93] Tellingly, lower courts have rejected similar attempts to assert "adjacency" jurisdiction over non-wetlands. For example, the Ninth Circuit rejected jurisdiction over an isolated pond located within 125 feet of a navigable tributary of San Francisco Bay.[94] In so holding, the Court explained that any nexus between the pond and the tributary "falls far short of the nexus that Justice Kennedy required in *Rapanos*."[95] The 2015 Rule, however, would assert jurisdiction over that pond and countless others like it due to the expansive definitions of "adjacent" and "significant nexus."

Finally, the 2015 Rule improperly defines "adjacency" with reference to "the 100-year floodplain."[96] Such a standard flouts the "*continuous* surface connection" required by the *Rapanos* plurality.[97] Equally problematic, a water that is merely located within the 100-year floodplain of a navigable water is so rarely connected to that navigable water that it cannot be said to "significantly affect the chemical, physical, and biological integrity of the other covered

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[88] *Id.* at 781.
[89] *Id.* at 781-782.
[90] *Id.* at 764; *accord id.* at 730 (plurality).
[91] *Id.* at 786.
[92] *Id.* at 764 (Kennedy).
[93] 547 U.S. at 742.
[94] *See S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir. 2007).
[95] *Id.*
[96] 33 C.F.R. § 328.3(c)(2)(ii).
[97] *See* 547 U.S. at 742.

water[]."[98] At most, such a water would have an "insubstantial" "effect[] on water quality" that "fall[s] outside the zone fairly encompassed by the statutory term 'navigable waters.'"[99]

4. The 2015 Rule defines "significant nexus" so broadly that it revives the defunct Migratory Bird Rule.

In addition to categorically asserting jurisdiction over various types of water bodies, the 2015 Rule allows for case-by-case assertions of jurisdiction over additional water features that meet the rule's definition of "significant nexus." Because the rule's definition of that term goes far beyond what *SWANCC* or Justice Kennedy's concurrence in *Rapanos* envisioned, the rule is unlawful and needs to be repealed.

Justice Kennedy looked to the concept of "significant nexus" "to give the term 'navigable' some meaning" by limiting federal jurisdiction to wetlands (not all waters) with a significant impact on traditional navigable waters.[100] In his view, a water feature is jurisdictional only if it "significantly affect[s] the chemical, physical, and biological integrity of … waters more readily understood as 'navigable.'"[101] Justice Kennedy believed his "significant nexus" test provides assurance that the CWA's jurisdiction would not extend to features that are too "remote" or whose "effects on [navigable] water quality are speculative or insubstantial."[102]

The "significant nexus" standard in the 2015 Rule does not provide such assurance. That is because the rule asserts jurisdiction over any water feature so long as it affects the "chemical, physical, *or* biological integrity" of a traditional navigable water, interstate water, or territorial sea,[103] thereby ignoring the conjunctive nature of both the statute (CWA § 101(a)) and Justice Kennedy's test. Changing the conjunctive to the disjunctive has profound consequences. By requiring only one type of connection (*e.g.*, biological), the 2015 Rule effectively reinstates the Migratory Bird Rule that the Supreme Court struck down in *SWANCC*. Indeed, the 2015 Rule allows for jurisdiction based on a single function, such as the "[p]rovision of life cycle dependent aquatic habitat" between one water and some other distant water.[104] That is the exact theory of jurisdiction reflected in the Migratory Bird Rule, under which isolated non-navigable ponds were jurisdictional solely "because they serve[d] as habitat for migratory birds."[105]

In fact, the 2015 Rule does even more than improperly revive the Migratory Bird Rule. In discussing the significant nexus test, the Agencies stated that they can find evidence of biological connectivity by identifying the presence of "amphibians, aquatic and semi-aquatic reptiles, [and] aquatic birds."[106] Elsewhere in the preamble to the final 2015 Rule, the Agencies discussed the biological connectivity of waters in floodplains to include "integral components of river food webs, providing nursery habitat for breeding fish and amphibians, colonization opportunities for

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[98] *Id.* at 780 (Kennedy).
[99] *Id.*
[100] 547 U.S. at 778-79.
[101] *Id.* at 780.
[102] *Id.*
[103] *See* 33 C.F.R. § 328.3(c)(5) (emphasis added).
[104] *See* 33 C.F.R. 328.3(c)(5)(ix).
[105] *SWANCC*, 531 U.S. at 171-72.
[106] *Id.*

stream invertebrates and maturation habitat for stream insects."[107] What this means is most anything else that could live in and around water can singlehandedly serve as the basis for asserting jurisdiction over countless non-navigable, intrastate, isolated water features. Such a capacious assertion of jurisdiction "would result in a significant impingement of the States' traditional and primary power over land use" and thus must be repealed in light of *SWANCC*.[108]

5. The Rule's distance thresholds lack scientific support.

Water features are categorically jurisdictional as "adjacent" if they are within the 100-year floodplain of a category (1)-(5) feature and within 1,500 feet of its ordinary high water mark.[109] Additionally, waters are categorically jurisdictional if they are within 100 feet of the ordinary high water of a category (1)-(5) feature or within 1,500 feet of the high tide line of a category (1)-(3) feature.[110] On a case-specific basis, water features can be jurisdictional if they are within the 100-year floodplain of a category (1)-(3) feature or 4,000 feet of the ordinary high water mark of a (1)-(5) feature, and they are found to have a "significant nexus" to a category (1)-(3) feature.[111] In a nutshell, the Agencies failed to explain these distance cutoffs, and nothing in the record supports them.

The preamble to the final rule comes very close to admitting that the Agencies relied on the 100-year floodplain (to define "adjacent" and "significant nexus" waters) based on administrative convenience, not science.[112] And if that were true, why did the Agencies choose that particular floodplain, rather than using a shorter period for which flood limits can be determined more easily and with more certainty? Given that the record contains no justification for using the 100-year floodplain, it is perhaps understandable that the Agencies concede the lack of "scientific consensus" over which flood interval to use.[113] In any event, the lack of consensus does not justify the Agencies' dart throw.

The Agencies acted in a similarly arbitrary manner in choosing the 1,500-foot and 4,000-foot distance thresholds from the ordinary high water mark. While they vaguely claim reliance on unidentified "scientific literature," their own "technical expertise and experience," and the convenience "of drawing clear lines,"[114] it appears as though the Agencies plucked numbers from thin air. Indeed, the 2015 Rule offered no evidentiary basis for numbers that the Agencies basically *admitted* they made up.[115] While it is true that the Agencies enjoy considerable deference from reviewing courts examining their technical and scientific judgments, such deference is inappropriate in the absence of evidence demonstrating how they arrived at the

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[107] *Id.* at 37,063.
[108] 531 U.S. at 174.
[109] *See* 33 C.F.R. § 328.3(c)(2)(ii).
[110] *Id.* § 328.3(c)(2)(i), (iii).
[111] *Id.* § 328.3(a)(8).
[112] *See* 80 Fed. Reg. at 37,089 (noting that the 100-year floodplain serves "purposes of clarity" and "regulatory certainty").
[113] *See* EPA, *Questions and Answers—Waters of the U.S. Proposal* 5, perma.cc/7RRP-V46X.
[114] 80 Fed. Reg. at 37,085; *see also id.* at 37,090 (referencing the Agencies' "extensive experience making significant nexus determinations" as having "informed the[ir] judgment" in selecting the 4,000-foot boundary).
[115] *See* 80 Fed. Reg. at 37,090 (acknowledging that "the science does not point to any particular bright line").

specific numbers in the final rule. Because the 2015 Rule relies heavily on an arbitrary floodplain interval and distance thresholds, it must be repealed.

C. The 2015 Rule is Unconstitutional

The supplemental notice does not propose to repeal the 2015 Rule based on constitutional violations, though the Agencies indicate they are evaluating additional concerns such as whether the rule exceeded Congress's authority under the Commerce Clause.[116] The Agencies also recognize (in the legal background discussion) that it is important to provide fair and predictable notice of the limits of federal jurisdiction under the CWA given the Act's substantial criminal and civil penalties.[117] For the reasons articulated below, the undersigned organizations believe the 2015 Rule is unconstitutional in at least two ways. First, it is vague to the point of violating basic principles of due process. Second, it violates the Commerce Clause and federalism principles.

1. The 2015 Rule is so vague that it violates the Due Process Clause.

The Fifth Amendment's Due Process Clause demands that a law provide regulated parties with fair notice so that they "know what is required of them [and] may act accordingly."[118] A regulation that fails to do so is void for vagueness. "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns."[119] First, it ensures that citizens have fair notice of the rules governing them. Second, it provides standards for enforcement "so that those enforcing the law do not act in an arbitrary or discriminatory way."[120] Of those concerns, the second is "the more important" because, absent objective guidelines, the law "may permit a standardless sweep [that] allows [government officials] to pursue their personal predilections."[121] Thus, the Due Process Clause is offended by regulations "so imprecise that [arbitrary or] discriminatory enforcement is a real possibility."[122]

A review of a few of the 2015 Rule's key terms and provisions shows that they fall woefully short of providing the kind of objective guidelines the Constitution requires.

Ordinary high water mark: In deciding whether the presence of physical indicators of an ordinary high water mark exist and where they lie, agency staff are allowed to rely on whatever "other … means" they deem "appropriate."[123] As if this catch-all language were not enough to permit standard-less sweeps by agency staff, existing Corps guidance states that "[t]here are no 'required' physical characteristics that must be present to make an OHWM determination."[124]

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[116] *See* 83 Fed. Reg. at 32,248-49.
[117] *See id.* at 32,237.
[118] *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).
[119] *Id.*
[120] *Id.*
[121] *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).
[122] *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991).
[123] 33 C.F.R. § 328.3(c)(6).
[124] Corps Regulatory Guidance Letter No. 05-05, at 3 (Dec. 7, 2005).

Not only does the 2015 Rule fail to meaningfully constrain the Agencies in determining *what* constitutes an ordinary high water mark, it also fails to constrain them in deciding *how* to make that determination. Agency staff making these determinations need not visit any sites; instead, the rule blesses their ability to "establish" ordinary high water marks using "[o]ther evidence besides direct field observation."[125] Regulators may, for instance, rely on computer models, "local stream maps," "aerial photographs," "light detection and ranging" data, and other unidentified "desktop tools that provide for the hydrologic estimation of discharge" to identify an ordinary high water mark, even where "physical characteristics" of bed and banks and an ordinary high water mark "are absent in the field."[126] Landowners seeking to learn whether they have a jurisdictional water on or near their property are thus left to make their best guess—using whatever current or historic information they might be able to get their hands—with no guarantee that the Agencies will rely on the same factors. Just the opposite, the rule makes clear that decisions about which factors to rely on in assessing the presence of an ordinary high water mark are left to the Agencies' "experience and expertise." That is not the type of meaningful constraint that due process requires.[127]

100-year floodplain: The provisions in the 2015 Rule dealing with adjacency (specifically, the definition of "neighboring") and case-specific assertions of jurisdiction over waters with a "significant nexus" to jurisdictional waters both reference the 100-year floodplain.[128] While at first glance, it appears that landowners may be readily able to verify whether water features on their lands fall within this particular floodplain, the preamble to the final 2015 Rule demonstrates why the 100-year floodplain concept fails to give fair notice and is conducive to arbitrary enforcement.

The Agencies stated that they will rely on "published FEMA Flood Zone Maps to identify the location and extent of the 100-year floodplain" in implementing the 2015 Rule, yet they acknowledge that "much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground."[129] The Agencies further stated that they will assess accuracy "based on a number of factors" and, in the absence of an accurate and up-to-date FEMA map, the Agencies indicate they will rely on "other available tools to identify the 100-year floodplain," including "other Federal, State, or local floodplain maps, Natural Resources Conservation Service (NRCS) Soil Surveys (Flooding Frequency Classes), tidal gage data, and site-specific

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[125] 80 Fed. Reg. at 37,076.
[126] *Id.* at 37,077.

[127] For similar reasons, the 2015 Rule is just as vague when it comes to ascertaining whether ditches are jurisdictional "tributaries" or whether they fall under one of the narrow ditch exclusions. Determining the applicability of the ditch exclusions can involve an inquiry into the "historical presence of tributaries using a variety of resources, such as historical maps, historical aerial photographs, local surface water management plans, street maintenance data, wetland and conservation programs and plans, as well as functional assessment and monitoring efforts." 80 Fed. Reg. at 37,078-79. How individual farmers and ranchers are expected to access and assess all of that data is a mystery, meaning they have no viable means of learning whether a ditch on their property is jurisdictional. That is particularly true because the Rule does not say how far back in history regulated parties must look in ascertaining the presence of a previously existing tributary.

[128] *See* 33 C.F.R. §§ 328.3(a)(8), 328.3(c)(2).
[129] 80 Fed. Reg. at 37,081.

modeling."[130] This approach does nothing to put landowners on notice of when waters on their property may be considered jurisdictional as either "adjacent" waters or as case-specific "significant nexus" waters. Even if landowners happen to be in a part of the country where FEMA has generated a floodplain map, they may not know whether agency staff will decide to deem those maps inaccurate or outdated. Should agency staff decide FEMA maps are not accurate, landowners then face the additional task of trying to figure out what "available tools" regulators may use to determine the 100-year floodplain for purposes of asserting jurisdiction.

Significant nexus: The 2015 Rule's "case-by-case" significant nexus test is obviously lacking in objective limits. At every stage, it turns on subjective observations and opaque analyses. Take the case of a farmer who has a small, isolated pond on his property. Even if everyone agrees that the pond has a direct connection to a primary water, the farmer's challenge is only beginning, because, in deciding whether his pond has a "significant nexus" to a primary water, he must still identify all traditional navigable waters, interstate waters, and tributaries within 4,000 feet of the pond. If the farmer finds such a water, he must then figure out whether regulators will conclude that the pond, together with "other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of the nearest primary water.[131] Such a task borders on crystal ball gazing.

Take, for instance, the Rule's definition of "similarly situated." This phrase encompasses waters that "function alike and [are] sufficiently close to function together in affecting downstream waters."[132] But what does it mean for two ponds function alike or to function together? The Rule does not say, which means agency personnel are free to make their own judgment calls. Likewise, what qualifies as "significantly affect[ing]" a primary water? The Rule says only that an effect is significant when it is "more than speculative or insubstantial,"[133] but that poor attempt at a definition is no clearer than the word "significant." And what it means for a water feature to "significantly affect[]" the "integrity" of a primary water is anybody's guess.

Categorical exemptions: Many of the 2015 Rule's exemptions are difficult to apply, such as the exclusions for farm and stock watering ponds and various other features "created in dry land." While common sense suggests it should be easy to figure out whether something was created in "dry land," the lack of a definition for that term, combined with the Agencies' circular explanations, leave landowners puzzling over how to apply the "dry land" exclusions. In trying to explain what is "dry land," the Agencies first say the "term is well understood based on the more than 30 years of practice and implementation" and that it "refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, and the like."[134] The Agencies immediately turn around and state that they declined to define "dry land" in the rule because they "determined that there was no agreed upon definition given geographic and regional variability."[135] Thus, the rule punts on providing "further clarity" until "implementation."[136] The refusal to clarify a key term that is used in numerous exclusions

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[130] *Id.*
[131] 33 C.F.R. § 328.3(c)(5).
[132] *Id.*
[133] *Id.*
[134] 80 Fed. Reg. at 37,098.
[135] *Id.* at 37,098-99.
[136] *Id.*

means, of course, that agency staff retain broad discretion to limit the scope of exclusions that apply only to features created in "dry land." This opens the door to inconsistent and arbitrary results.

Elsewhere, the 2015 Rule includes an exemption for "puddles,"[137] but not for "depressional wetlands."[138] This leaves farmers and ranchers to wonder what exactly distinguishes a recurring puddle from a small depressional wetland. The Rule does not clearly provide them answers. Similar problems exist in distinguishing "[e]rosional features, including gullies, rills, and other ephemeral features that do not meet the definition of a tributary,"[139] from jurisdictional tributaries. The rule defines a tributary in part based on the presence of "a bed and banks and an ordinary high water mark"—all of which are often present in the very gullies, rills, and other ephemeral features the rule says are exempt from its scope. Where to draw the line will ultimately be a question for agency staff to answer apparently based on little more than whim. Due process demands more.

* * *

Even where the Agencies have some relatively objective means of ascertaining the existence of a jurisdictional water, the vagueness problem will remain an intractable one for many regulated parties, who will be unable themselves to figure out whether waters on their lands are subject to federal jurisdiction. A rule is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits."[140] The 2015 Rule easily flunks that test. As noted above, in identifying ordinary high water mark, to use an example, the Agencies will be using remote sensing technology and desktop tools that are simply not available to the average landowner. That means the Agencies are free to assert jurisdiction over a depression in the landscape that is largely undetectable except through sophisticated digital photography or satellite imaging that most people cannot access.

Predictably, it is the Rule's "case-by-case" waters category that presents some of the greatest headaches for landowners. The ambiguity and complexity inherent in deciding whether a water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, *or* biological integrity of" a primary water based on "any single function or combination of functions performed by the water,"[141] hardly needs elaborating. It bears special mention, however, that determining a water feature's chemical, physical, or biological effects requires technical, scientific, and financial resources well beyond what most landowners possess. Because the Rule gives regulators too much discretion and regulated parties too little notice of what it covers, it violates due process. That is another independent reason for rescinding it.

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[137] 33 C.F.R. § 328.3(b)(4)(vii)
[138] 80 Fed. Reg. at 37,093.
[139] 33 C.F.R. § 328.3(b)(4)
[140] *Chicago v. Morales*, 527 U.S. 41, 56 (1999).
[141] 33 C.F.R. § 328.3(c)(5).

2. The 2015 Rule violates the Commerce Clause and federalism principles.

The States' authority to regulate and manage local lands and waters has long been viewed as a core sovereign interest. It is, in fact, "perhaps the quintessential state activity,"[142] which is one reason why the CWA expressly recognizes the States' inherent powers over local lands and water resources.[143] Indeed, principles of federalism are interwoven throughout the CWA.[144]

The Supreme Court has relied on the "traditional state power" over land and water regulation to support narrower interpretations of the CWA's scope. In *SWANCC*, for example, the Court reasoned that allowing federal jurisdiction over an isolated, seasonal pond based solely on the presence of migratory birds not only failed to give effect to the statutory term "navigable," it raised "significant constitutional and federalism questions."[145] On the latter holding, the Court clarified that, even were there some ambiguity regarding whether the Federal Government has jurisdiction over nonnavigable, isolated, intrastate waters, the Court would nevertheless have rejected the Corps' interpretation because would impermissibly "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power"—namely, the States' "traditional and primary power over land and water use."[146]

The plurality opinion in *Rapanos* likewise recognized the importance of respecting the federal-state balance that Congress struck in the CWA. The plurality chastised lower courts for "continu[ing] to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries,'" and for "continu[ing] to define 'adjacent' wetlands broadly."[147] The four Justices expressed concern over how "even the most insubstantial hydrological connection may be held to constitute a 'significant nexus,'" despite the Court's holding in *SWANCC*.[148] Of particular importance here, the plurality emphasized that regulation of the "development and use" of "land and water resources" is a "quintessential state and local power."[149]

The 2015 Rule fundamentally readjusts the federal-state balance and pushes the federal government's authority well beyond the limits of the Commerce Clause. As 31 States recently explained to the Sixth Circuit, the Rule covers "virtually every potentially wet area of the country," ranging "[f]rom prairie potholes in North Dakota, to arroyos in New Mexico, ephemeral drainages in Wyoming, and coastal prairie wetlands in Texas."[150] The Agencies themselves admit that the Rule potentially covers "the vast majority of the nation's water features."[151] What is left, one asks, of the States' longstanding and fundamental power to

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[142] *FERC v. Mississippi*, 456 U.S .742, 768 n.30 (1982).
[143] *See* 33 U.S.C. § 1251(b).
[144] *See SD Warren Co. v. Maine bd. of Envt'l Protection*, 547 U.S. 370, 386–87 (2006) (observing that the CWA "provides for a system that respects the States' concerns" and interpreting another CWA provision in a way that "preserve[d] the state authority apparently intended").
[145] 531 U.S. at 164, 172.
[146] *Id.* at 173-74.
[147] 547 U.S. at 726-29.
[148] *Id.* at 728.
[149] *Id.* at 737-38.
[150] *Murray Energy Corp. v. U.S. EPA*, No. 15-3799, Doc. # 141, at 71.
[151] *Id.* (quoting Rule's Economic Analysis).

regulate the lands and waters within their borders, if so many water and land features are now under the Agencies' jurisdiction?

The concern here is not merely over the geographic extent of federal regulation, but the effects of that regulation. When the Agencies assert jurisdiction under the CWA, the effect is often to displace state and local regulation. Compounding the problem, the federal standards and requirements that accompany federal jurisdiction under the CWA necessarily impose burdens directly on the States themselves. For example, States are required to develop, review, and (if appropriate) update water quality standards for federal jurisdictional waters within their borders.[152] For waters not meeting those standards, States must develop often complicated total maximum daily loads.[153] States must also issue water quality certifications for federal permit and licenses, including Section 404 permits issued by the Corps.[154]

To accomplish such a sweeping grab of traditional state powers, the Agencies must identify some basis in the Constitution for doing so, but no such basis exists. Throughout the Technical Support Document for the 2015 Rule, the Agencies attempted to justify the Rule under the Commerce Clause, but those attempts fall flat. The Commerce Clause grants the Federal Government power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[155] That power extends to just three areas: (1) the "channels of interstate commerce," (2) the "instrumentalities of interstate commerce," and (3) "activities that substantially affect interstate commerce."[156]

The 2015 Rule imposes federal authority outside of those areas. Most notably, because it reaches so far beyond waters that can actually be used for interstate commerce, it cannot be upheld as a regulation of the channels of interstate commerce. To be sure, the Commerce Clause gives Congress authority to regulate more than just navigable portions of waters.[157] But the Rule goes far beyond that by sweeping in numerous local land and water features that are not navigable-in-fact and have only the barest connection to navigable-in-fact waters—even those features that connect to navigable waters just once in a century. Ephemeral trickles that happen to cross state lines, dry washes in Western deserts, and isolated wetlands nearly a mile from any tributary are all swept up in the Rule's scope. So are water features that are "adjacent" to navigable waters, even if there is no indication that those features ever connect to or otherwise affect navigable waters. Regulation of those features cannot possibly be justified as regulation of a channel of interstate commerce.

Nor can the Rule be justified as one covering activities that "substantially affect interstate commerce." For starters, it bears emphasis that the Supreme Court in *SWANCC* clearly reversed the lower court's holding that the CWA reaches as many waters as the Commerce Clause will allow, such as waters that are jurisdictional based on the regulation of activities that cumulatively

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[152] 33 U.S.C. § 1313.
[153] *Id.* § 1313(d).
[154] *Id.* § 1341(a)(1).
[155] U.S. Const. art. I, § 8, cl. 3.
[156] *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).
[157] *See, e.g., Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) (recognizing that "Cognress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions").

have a substantial effect on interstate commerce.[158] The Court declined the agency's invitation to engage in a substantial effects analysis and instead chose to avoid the significant constitutional and federalism questions raised by the Corps' Migratory Bird Rule.[159]

Nonetheless, even if a court were to undertake a substantial effects analysis, the 2015 Rule would be unlikely to pass muster. In deciding whether regulation covers activities substantially affecting interstate commerce, the Supreme Court has considered: (1) whether the regulation addresses economic activity; (2) whether the regulation's reach is limited to activities having a connection with interstate commerce; and (3) whether the regulation's connection to interstate commerce is so attenuated that it would "effectually obliterate the distinction between what is national and what is local."[160] The 2015 Rule does not qualify under any of those factors.

- The rule does not address economic activity. The Agencies can prohibit landowners from disposing of brush or leaves in shallow depressions on their properties, provided those depressions are within 1,500 feet of the ordinary high water mark of a "tributary" to a navigable water. That is not economic activity.

- The rule does not limit its reach to activities having a connection with interstate commerce. It defines tributaries, adjacent waters, and case-by-case waters in ways that capture numerous water features and usually-dry lands lacking any meaningful connection to interstate commerce. As just one example, the Agencies' case-by-case jurisdiction under the Rule authorizes regulation over lands or waters that "export … organic matter" to a primary water.[161] So if a deer travels from a secluded land or water feature to a primary water and a plant or invertebrate hitchhikes on the deer's fur, that would be sufficient for the Agencies to assert jurisdiction under the Rule. Likewise, if the land feature "[e]xport[s] … food resources, because the deer travels to eat there and then visits the primary water where it deposits seeds from the food resource, the Agencies could deem the land feature jurisdictional under the Rule. None of that has anything to do with interstate commerce.

- Like the legislation in *Lopez* and *Morrison*, the 2015 Rule relies on an attenuated causal chain that would, if followed, "obliterate the distinction between what is national and what is local."[162] In *Lopez* and *Morrison*, the Court invalidated legislation in part because, whatever the aggregate effect of regulating noneconomic activity in those cases, allowing such regulation by the Federal Government would impermissibly permit the Federal Government to take over whole "areas of traditional state regulation."[163] The same goes here, inasmuch as the rule's assertion of authority over the majority of hydrologic features

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[158] *See* 531 U.S. at 168 n.3 & 166 (quoting from 191 F.3d 845, 850-52 (7th Cir. 1999)).
[159] *See id.* at 173.
[160] *Lopez*, 514 U.S. at 557; *see also United States v. Morrison*, 529 U.S. 598 (2000).
[161] 33 C.F.R. § 328.3(c)(5)(vii).
[162] *See Lopez*, 514 U.S. at 557.
[163] *Morrison*, 529 U.S. at 615.

throughout the country intrudes upon the States' authority to manage local lands and waters.

At bottom, the Rule is not supportable as an exercise of the Commerce Clause power. Instead, it usurps the States' longstanding and primary authority to regulate and oversee the lands and waters within their borders. In that respect, it is unconstitutional and ought to be repealed on that basis too. But even if repeal were not constitutionally required, the canon of constitutional avoidance, which requires that statutes be construed so as to minimize constitutional problems, calls for a far narrower interpretation of the CWA than the Rule puts forth.[164] In addition, as the Supreme Court instructed in *SWANCC*, the CWA should not be read in a manner that displaces traditional state regulation absent a clear statement authorizing such displacement. There is nothing in the CWA authorizing displacement of state authority over land and water use. In fact, the Act contains the opposite statement: it recognizes, preserves, and protects such primary responsibilities and rights of the states.[165]

III. Conclusion

For the foregoing reasons, the undersigned organizations strongly support the Agencies' supplemental proposal to permanently repeal the 2015 Rule. That rule would effectively confer federal control over all but the most remote and unconnected waters, including features that are ubiquitous on farm and ranchlands that more closely resemble land than water, even though Congress did not intend to give the Agencies such control. While it is true that the rule does not currently apply, the Agencies cannot allow it to remain on the books and must instead repeal the rule in its entirety. Because the rule was an amendment to then-existing regulations, its repeal will effectively reinstate the pre-2015 regulations. As the undersigned organizations have long maintained, those preexisting regulations are far from ideal from the perspective of landowners who need to have a set of clear and logical rules to follow. Thus, the undersigned organizations encourage the Agencies to move forward with their ongoing efforts to develop a new rule that finally achieves the Agencies' goal of defining "waters of the United States" in a way that is faithful to Congress's intent, is consistent with Supreme Court precedent, and achieves clarity and regulatory certainty. For now, however, the Agencies can take a step in the right direction by finalizing their proposal to repeal what several courts have strongly suggested is a fatally flawed rule.

Sincerely,

American Farm Bureau Federation
Agri-Mark, Inc.
American Dairy Coalition
American Sugar Cane League
CropLife America
Dairy Producers of New Mexico

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[164] *E.g.*, *Clark v. Martinez*, 543 U.S. 371, 379 (2005).
[165] *SWANCC*, 531 U.S. at 172-74.

Dairy Producers of Utah
Idaho Dairymen's Association
Illinois Farm Bureau
Iowa Farm Bureau Federation
Minnesota Agricultural Water Resource Center
Missouri Dairy Association
National Alliance of Forest Owners
National Association of State Departments of Agriculture
National Cattlemen's Beef Association
National Chicken Council
National Corn Growers Association
National Cotton Council
National Council of Farmer Cooperatives
National Milk Producers Federation
National Turkey Federation
Northeast Dairy Farmers Cooperatives
Ohio AgriBusiness Association
Ohio Corn & Wheat Growers Association
Oregon Dairy Farmers Association
South Dakota Agri-Business Association
St. Albans Cooperative Creamery
Texas Association of Dairymen
Texas Cattle Feeders Association
The Fertilizer Institute
United Egg Producers
United States Cattlemen's Association
Upstate Niagara Cooperative, Inc.
U.S. Poultry & Egg Association
USA Rice
Washington State Dairy Federation
Wyoming Ag-Business Association

CC: Matthew Z. Leopold, General Counsel, U.S. Environmental Protection Agency
David Ross, Assistant Administrator for the Office of Water, U.S. Environmental Protection Agency

Appointment

From: Tovar, Katlyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=149c0f312d2c48cf91809d6edf01f904-Tovar, Katl]
Sent: 3/4/2019 4:59:28 PM
To: Segal, Scott [scott.segal@bracewell.com]; ssnyder@ingaa.org; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Wyman, Christine [christine.wyman@bracewell.com]; dduncan@hunton.com
CC: Owscheduling [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=04524cfb1f2a47809712c095e35707f3-Owschedulin]; emily.seattle Personal Email / Ex. 6 [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=64b6184cd90a4d58a2c3f23d1a04b466-emily.seatt]; Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Kramer, Jessica L. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7112d115592049c6b99dc721bea9eb3a-Kramer, Jes]

Subject: Discussion on 401(g)
Attachments: Real ID Information.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700 or 202-564-3318 for escort

Start: 3/18/2019 8:30:00 PM
End: 3/18/2019 9:00:00 PM
Show Time As: Busy

POC: Christine Wyman
Ph: 202.828.5801

Attendees:
Christine Wyman
Scott Segal
Sandra Snyder
Deidre Duncan

Message

From: Jeff Leahey (NHA) [jeff@hydro.org]
Sent: 10/19/2018 7:32:52 PM
To: Papadopoulos, George [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5def9d742e6e4bbbbeebf45f13686989-Papadopoulos, George]
CC: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: NHA Comments on Draft NPDES GP for Hydro Facilities in MA and NH
Attachments: NHA comments on Region 1 GP for MA and NH Hydros (with attachment).pdf

Mr. Papadopoulos,

Attached, please find the comments of the National Hydropower Association (NHA) on the proposed NPDES general permits for hydroelectric facilities within the Commonwealth of Massachusetts (MAG360000) and the State of New Hampshire (NHG3600000).

If there are any questions regarding this submission, please feel free to contact me.

Sincerely,

Jeffrey Leahey
Deputy Executive Director
National Hydropower Association
jeff@hydro.org
202.750.8403

National Hydropower Association
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October 19, 2018

Via E-mail

Mr. George Papadopoulos
U.S. Environmental Protection Agency, Region 1
Office of Ecosystem Protection
5 Post Office Square, Suite 100
Mail Code OEP06-1
Boston, MA 02109-3912
Papadopoulos.george@epa.gov

Re: Comments of the National Hydropower Association on EPA Region 1 Proposed Issuance of NPDES General Permits for Hydroelectric Facilities Within the Commonwealth of Massachusetts (MAG360000) and the State of New Hampshire (NHG3600000)

Dear Mr. Papadopoulos:

The National Hydropower Association (NHA) respectfully submit the following comments on the EPA Region 1 Proposed Issuance of National Pollution Discharge Elimination System (NPDES) General Permits for Hydroelectric Facilities Within the Commonwealth of Massachusetts (MAG360000) and the State of New Hampshire (NH3600000), 83 Fed. Reg. 42118 (August 20, 2018). We appreciate the opportunity to provide comment on the proposal, specifically on the application of cooling water intake structure (CWIS) requirements, which we believe raises significant issues for hydropower project operators in these jurisdictions and beyond.

Sincerely,

Jeffrey Leahey
Deputy Executive Director
National Hydropower Association
601 New Jersey Avenue, NW, Suite 660, Washington, DC 20001

cc: David Ross, EPA Headquarters (Ross.davidp@epa.gov)
Lee Forsgren, EPA Headquarters (Forsgren.lee@epa.gov)
Andrew Sawyers, EPA Headquarters (Sawyers.andrew@epa.gov)
Owen McDonough, EPA Headquarters (McDonough.owen@epa.gov)

Introduction

On behalf of our members in Massachusetts and New Hampshire, NHA[1] raises significant concerns regarding Region 1's proposal to subject hydroelectric facilities in these jurisdictions to the requirements of Clean Water Act (CWA) § 316(b), 33 U.S.C. § 1326(b), and EPA's 2014 Final Rule to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014) (2014 Rule or Existing Facilities Rule) and believes that the § 316 (b)-related provisions should be withdrawn.

In addition to the summary response on the § 316(b) issues below, NHA is including as an attachment, the joint comments filed with the Utility Water Act Group (UWAG) on Region 10's similar proposal for hydroelectric facilities in the State of Idaho. NHA also directs Region 1 to the further analysis by UWAG in its comments on the Region 1 proposal.

Finally, NHA is aware that several of our member companies are also filing comments on the proposal. We direct EPA Region 1 to those filings with regard to the potential impacts on projects of both the § 316(b) requirements and non-316(b) requirements (such as those on pH range limitations and total suspended solids monitoring) included in the proposal.

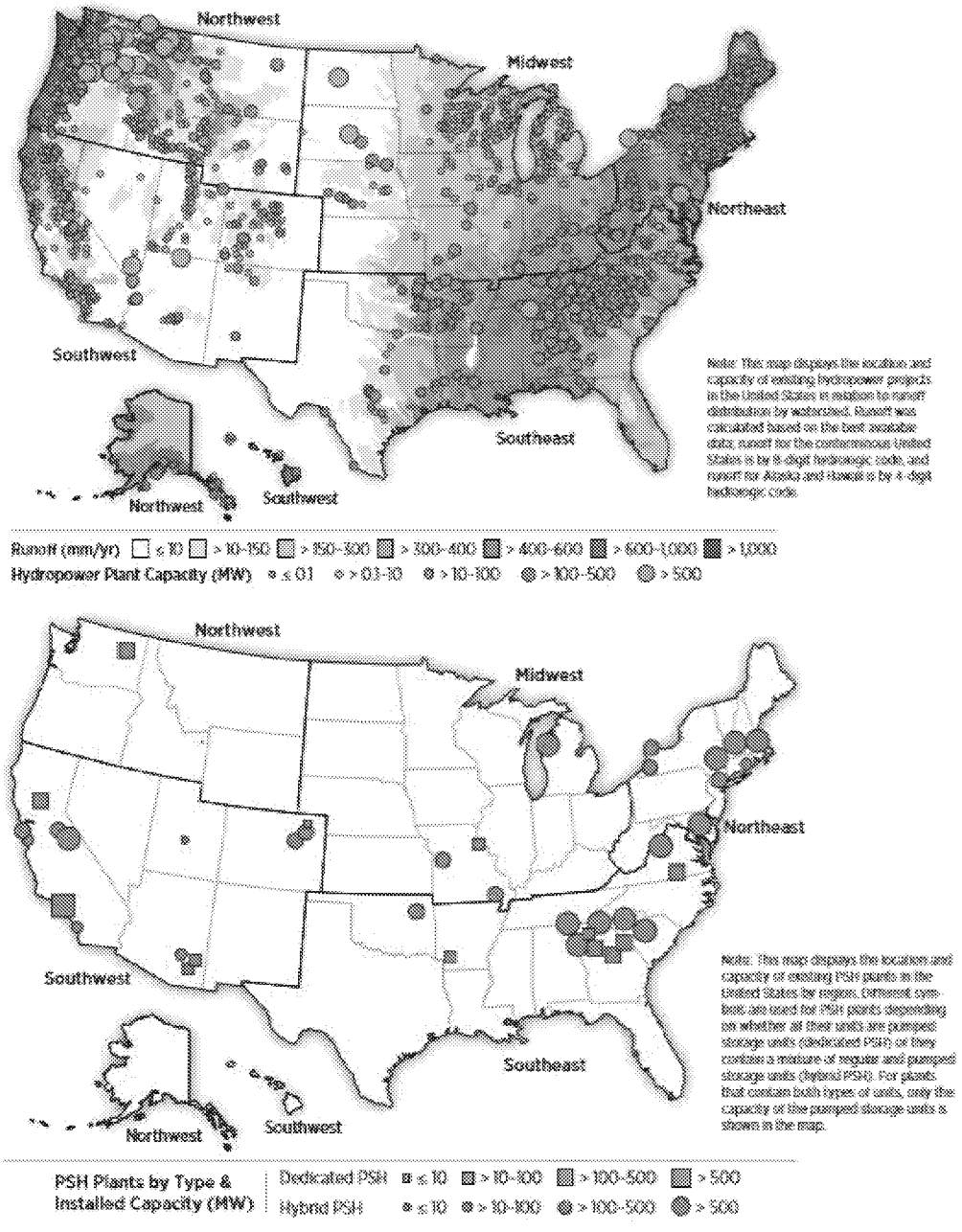
Summary Comments

NHA believes it is inappropriate to apply § 316(b) to hydroelectric facilities. To begin, when EPA proposed the underlying existing facility rule in 2011, it stated explicitly that withdrawals from hydroelectric facilities were not addressed in its Existing Facilities Rule. 76 Fed. Reg. 22,174, 22,190 (Apr. 20, 2011). **["hydro-electric plant withdrawals for electricity generation are not cooling water uses and are not addressed by today's proposal**"]. Emphasis added.

Because EPA viewed hydroelectric facilities as excluded, and the hydroelectric industry relied upon this statement, the agency did not solicit or collect any information on hydroelectric facilities. Further, at no point during EPA's long history of implementing § 316(b) have EPA's regulatory actions addressed or evaluated the applicability of CWA § 316(b) to hydroelectric facilities. To do so now would be a major expansion of the regulatory reach of this policy,

[1] The National Hydropower Association is the national non-profit trade association dedicated to promoting the growth of clean, affordable, U.S. hydropower. It seeks to secure hydropower's place as a renewable and reliable energy source that serves national environmental, energy, and economic policy objectives. NHA's membership includes more than 240 companies, from Fortune 500 corporations to family-owned small businesses. NHA members include public and investor-owned utilities, independent power producers, developers, equipment manufacturers and other service providers.

potentially encompassing the approximately 2200 conventional hydropower and pumped storage[2] plants located across the country. See figure below.[3]



Source: Uria-Martinez et al. 2015[21]

Figure 2-6. Map of facilities in the existing U.S. hydropower fleet: conventional hydropower (top) and PSH (bottom)

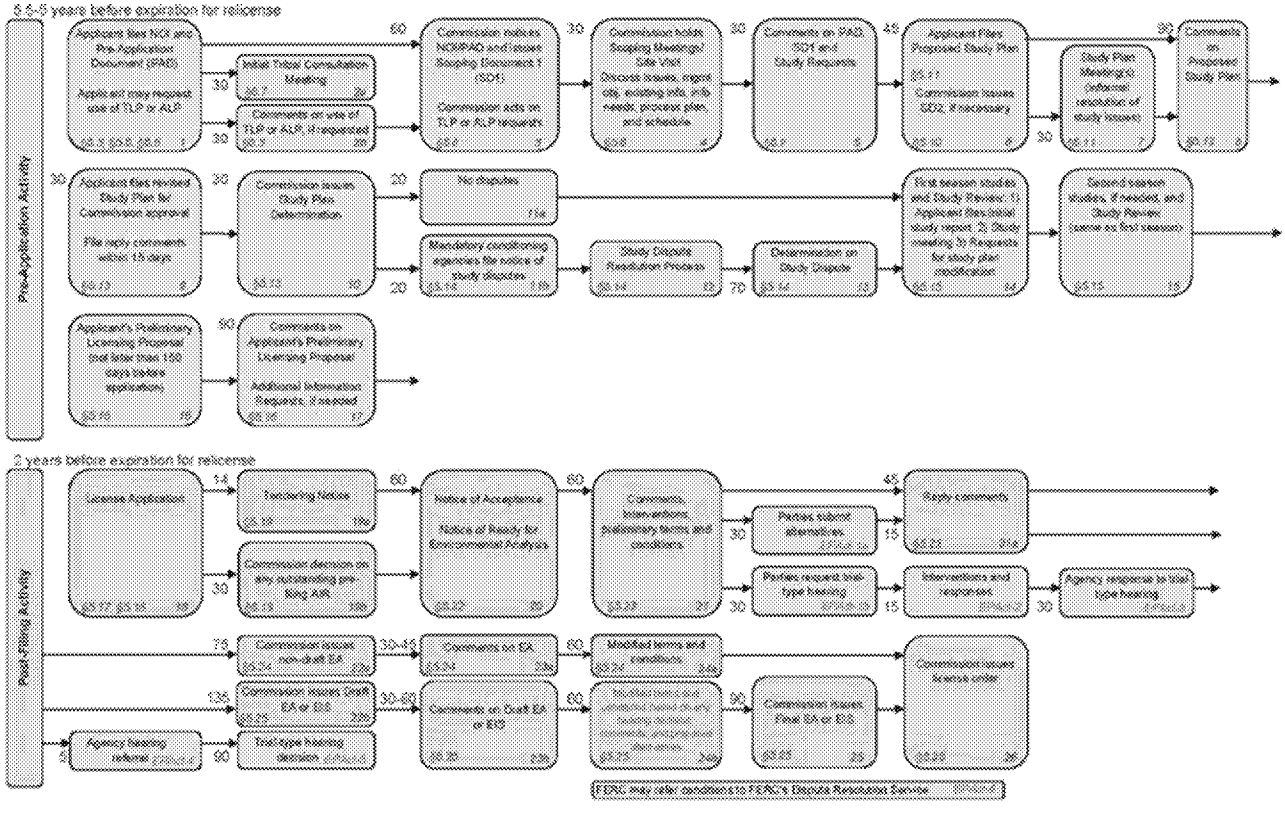
[2] NHA notes that in part 3.3 of the Draft General permit, Limitation on Coverage bullet l, states that discharges from pumped storage facilities are excluded from coverage. However, this determination is made on a case-by-case. Region 1 should provide examples as part of their fact sheet of what conditions will make a pumped storage facility eligible or ineligible.

[3] U.S. Department of Energy Hydropower Vision Report: A New Chapter for America's 1st Renewable Electricity Resource, Chapter 2, P. 79, Figure 2.6 (2016). https://www.energy.gov/sites/prod/files/2018/02/f49/Hydropower-Vision-021518.pdf

Beyond the procedural deficiencies with respect to hydroelectric facilities in the development of the Existing Facilities Rule, NHA also highlights the potential conflict this proposal would have with other statutory authorities under which some of the issues proposed are already addressed, specifically the comprehensive hydropower licensing process.

Hydropower has the longest, most complex regulatory approval timeline of any of the renewable energy technologies, with some projects taking 10 years or longer. This includes both new project authorization and existing project relicensing. The chart below outlines the integrated licensing process (ILP), the default process, of several, for authorizing hydropower projects in the United States.[4]

Integrated Licensing Process
(Section 241 of the Energy Policy Act of 2005)



*Section 241 of the Energy Policy Act of 2005 in pink.

[4] More information on hydropower licensing, including the ILP and other licensing processes can be found at https://ferc.gov/industries/hydropower/gen-info/licensing.asp?csrt=4417200556526671982.

A multitude of federal and state agencies, as well as the public and other stakeholders, participate in the process. Also, additional authorizations such as those required by federal dam owners if building on their infrastructure, are not included in the chart above.
The following is a list from the Federal Energy Regulatory Commission (FERC) of pertinent federal laws related to non-federal hydropower project development. They include:

- Federal Power Act (FPA)
- Rivers and Harbors Act of 1899
- U.S. Bureau of Reclamation Statutes
- National Environmental Policy Act (NEPA)
- Clean Water Act (CWA)
- Endangered Species Act (ESA)
- Fish and Wildlife Coordination Act
- National Historic Preservation Act
- Coastal Zone Management Act
- Magnuson-Stevens Fisheries Conservation Act
- Marine Mammal Protection Act
- Wild and Scenic Rivers Act
- Pacific Northwest Power Planning and Conservation Act

This list does not include other state or local statutes or permits that may also be required in the course of developing a project.

Including § 316(b) requirements for hydroelectric facilities would duplicate (and potentially conflict) with other federal and state authorities carried out as part of the extensive FERC licensing process, through which measures to minimize environmental impacts of hydropower operations are exhaustively considered, including impingement and entrainment issues.

Finally, hydroelectric facilities do not have CWIS in the conventional industrial context upon which the § 316(b) regulations were developed, which involve use of pumps to actively withdraw cooling water from surface waters of the U.S. This concept of CWIS is inappropriate for hydroelectric facilities, which are diversion structures by design - impounding water and transporting/passing water along a contiguous waterway to turn turbines used to generate electricity.

There are numerous different configurations for hydroelectric facilities and, in particular, their pipes and structures that divert cooling water. Given the wide range of facility configurations and water diversion processes for cooling, the technologies that EPA found to be the best available technologies and sampling requirements for steam electric power plants and manufacturing plants are not necessarily appropriate or practical for hydroelectric facilities.

In fact, it may be particularly problematic for some hydroelectric facilities to feasibly comply with the requirements outlined in the proposed permit. For example, one of the compliance

methods provided for in the proposed permit is to reduce velocity at the intake. But, for many hydroelectric facilities, it would be impossible to measure the velocity at the intake because the magnitude and force of the water going through the penstock is so great that no monitoring equipment could be located near the intake pipe or structure.

Moreover, even if some facilities could meet some of those requirements, the costs would likely far exceed the anticipated environmental benefits. This is particularly true for those cases where, relative to the total water transported through the facility, very small amounts of water (often, less than 1 percent) is diverted for cooling.

Conclusion

Water is a public resource and NHA and the hydropower industry recognize the necessity for, and value of, thorough review of project applications, which may include those issues Region 1 is looking to address in this proposal. However, NHA believes Section 316(b) was intended by Congress to address CWIS at steam electric and similar facilities, not hydropower projects. The appropriate regulatory venue for addressing the issues outlined in the proposal is through the comprehensive hydropower licensing process, not through a wholesale expansion of the Existing Facilities Rule for which there was no outreach or dialogue with the hydropower industry on its applicability or technical requirements.

Once again, NHA appreciates the opportunity to submit these comments on the proposal and also submit for your consideration the comments filed on Region 10's proposal, which provide further background and details on the association's positions on the applicability and feasibility of the § 316(b) requirements.

We look forward to further engagement with you on this proposal and offer the association as a resource as you address concerns regarding both the § 316(b) and non-§ 316(b) requirements.

July 11, 2018

Via E-Mail

Ms. Dru Keenan
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Re: Comments of the National Hydropower Association and the Utility Water Act Group on the EPA Region 10 Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho (IDG360000)

Dear Ms. Keenan:

The National Hydropower Association and the Utility Water Act Group respectfully submit the following comments on the EPA Region 10 Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho (IDG360000), 83 Fed. Reg. 18,555 (Apr. 27, 2018). We appreciate the opportunity to provide comment on the proposal, which we believe raises significant issues for hydropower project operators in the region and beyond.

If you have any questions about these comments or wish to discuss the issues further, please contact Kerry McGrath at (202) 955-1510 or kmcgrath@HuntonAK.com

We appreciate your attention to this important matter.

Sincerely,

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The National Hydropower Association and the Utility Water Act Group Comments on EPA's Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho

83 Fed. Reg. 18,555 (Apr. 27, 2018)

July 11, 2018

Executive Summary

With the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 10's proposed National Pollutant Discharge Elimination System ("NPDES") general permit for hydroelectric facilities discharging to waters within the State of Idaho ("Proposed Permit") (IDG360000), 83 Fed. Reg. 18,555 (Apr. 27, 2018), EPA, for the first time in a rule or permitting action of general applicability, takes the position that hydroelectric facilities are subject to the requirements of Clean Water Act ("CWA") § 316(b), 33 U.S.C. § 1326(b), and EPA's 2014 Final Rule to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014) ("2014 Rule" or "Existing Facilities Rule").

Unlike the other facilities to which EPA has applied § 316(b), EPA has not established technology-based limitations and standards for hydroelectric facilities, nor would it be reasonable to do so given the *de minimis* nature of their discharges. EPA never collected any information on the design, location, construction, and capacity of pipes or other features used to divert water for use in cooling equipment in hydroelectric facilities, or on the environmental impacts of those features. As these comments will show, that omission is crucial because hydroelectric facilities differ substantially from the largely land-based steam electric plants and industrial facilities for which EPA developed the 2014 Rule and every other § 316(b) rule the Agency has adopted. Of equal significance, EPA has never considered any of the legal, technical, or economic issues involved in applying § 316(b) to hydroelectric facilities.

The Proposed Permit nevertheless relies on the 2014 Rule's standards for steam electric power and manufacturing plants to establish the Region's best professional judgment ("BPJ") about what "cooling water intake structure" ("CWIS") is the best technology available ("BTA") "to minimize [the] adverse environmental effects of [CWIS]" at hydroelectric facilities, and

requires that the permit conditions reflecting those technologies be met within 180 days of the effective date of the permit.[1]

There are several key problems with Region 10's proposal. First, interpreting CWA § 316(b) to apply to hydroelectric generation facilities would be a significant expansion of EPA's regulatory jurisdiction and would duplicate other federal and state requirements specifically designed to address these environmental impacts. Second, EPA has never provided notice or an opportunity for comment on the applicability of § 316(b) to hydroelectric facilities. In fact, the Agency explicitly stated that withdrawals from hydroelectric facilities were not meant to be addressed in its Existing Facilities Rule. 76 Fed. Reg. 22,174, 22,190 (Apr. 20, 2011). It would be arbitrary and capricious, and contrary to the Administrative Procedure Act ("APA") requirements for fair notice and opportunity for comment, for EPA to now adopt such a novel, post-hoc interpretation. Third, even if EPA, after full and procedurally appropriate consideration of the issue, concluded that CWA § 316(b) applies to hydroelectric facilities (which NHA and UWAG believe it should not), the requirements of the 2014 Rule are not appropriate for such facilities, which are fundamentally different from the steam electric power and manufacturing plants EPA considered in that rulemaking, both in terms of the feasibility and cost of technology and the assessment of environmental impacts. Indeed, the 2014 Rule's requirements would be unnecessary in most cases because the rates of impingement and entrainment would be so low that additional controls would not be warranted.

In the Proposed Permit, Region 10 proposes to establish new BTA requirements based on its "best professional judgment" without first characterizing and evaluating the attributes of the facilities in question and determining whether they have already minimized adverse

[1] *See* EPA, NPDES Fact Sheet, Proposed Wastewater Discharges from Hydroelectric Generating Facilities General Permit, IDG360000, at 23 (Apr. 27, 2018) ("Proposed Permit Fact Sheet").

environmental effects and without identifying the technologies, measures, procedures, and methods the Agency anticipates facilities would use to meet the requirements imposed by the permit. In fact, it would be very difficult and, in some cases, infeasible, for many hydroelectric facilities to comply with the requirements outlined in the Proposed Permit and, even if some facilities could comply, the costs of doing so would likely far exceed any plausible environmental benefits. For all of these reasons, discussed in more detail in these joint comments, Region 10 should remove any § 316(b)-related provisions from the Proposed Permit. Finally, in addition to the § 316(b)-related measures, a number of discharge-related provisions in the Proposed Permit require clarification and/or revision.

Table of Contents

The National Hydropower Association and the Utility Water Act Group Comments on EPA's Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho

I. Introduction

EPA Region 10 has proposed to issue a NPDES general permit for hydroelectric facilities discharging to waters within the State of Idaho. 83 Fed. Reg. 18,555 (Apr. 27, 2018). With the Proposed Permit, EPA, for the first time in a rule or permitting action of general applicability, takes the position that hydroelectric facilities are subject to the requirements of CWA § 316(b), 33 U.S.C. § 1326(b), and EPA's 2014 Rule.

The Proposed Permit would apply only to hydroelectric facilities that require an NPDES permit to discharge pollutants associated with the operation of hydroelectric facilities to waters of the United States in Idaho, and that use water to cool some of that equipment, where the amount of cooling water falls below the 2014 Rule's qualifying thresholds.[2] Region 10 asserts that those hydroelectric facilities must meet CWA § 316(b) requirements established by the Director on a case-by-case, BPJ basis under 40 C.F.R. § 125.90(b). Proposed Permit Fact Sheet at 22-23, 28. The Proposed Permit purports to reflect Region 10's BPJ about what CWIS technology is the best available "to minimize [the] adverse environmental effects of [CWIS]" at hydroelectric facilities and requires that the permit conditions reflecting those technologies be met within 180 days of the effective date of the permit. Proposed Permit Fact Sheet at 23.

The Region's proposal to apply CWA § 316(b), even on a BPJ case-by-case basis, to hydroelectric facilities is neither compelled by nor consistent with the CWA. And, as demonstrated in these comments, even if CWA § 316(b) were applicable, the Region's proposed

[2] *See* Proposed Permit Fact Sheet at 19. The 2014 Rule's stringent requirements apply only to facilities that are point sources requiring an NPDES permit, withdraw from a water of the United States, use CWIS with a design intake flow of greater than 2 million gallons per day ("MGD"), and use 25 percent or more of the water withdrawn exclusively for cooling purposes. 40 C.F.R. § 125.91(a).

BPJ requirements are arbitrary and capricious for several reasons. First, the Fact Sheet demonstrates that the Region borrowed from and relies on a rule that EPA expressly stated did not apply to hydroelectric facilities and that the Agency adopted without any consideration of the technical feasibility or cost of application of such requirements to hydroelectric facilities. Proposed Permit Fact Sheet at 28.

Second, the Region has provided no independent analysis or support for any of the proposed requirements. Indeed, for many of the conditions imposed, neither the Fact Sheet nor the Proposed Permit provide any meaningful indication of technology or methods the permit might be expected to employ, nor does the proposal provide any discussion of the technical feasibility, costs, benefits, or other relevant factors associated with those conditions. This deficiency is not limited to the requirements based on EPA's 2014 Rule. The Region has not provided, for example, any analysis of or support for the Proposed Permit's requirement that, to comply with the proposed BTA requirements established for CWIS, facilities must maintain screening technologies established in National Marine Fisheries Service ("NMFS") Northwest Region's Anadromous Salmonid Passage Facility Design guidelines, which were developed by NMFS for hydroelectric turbines, not cooling water diversion pipes.

The National Hydropower Association ("NHA") is the national non-profit trade association dedicated to promoting the growth of clean, affordable, U.S. hydropower. It seeks to secure hydropower's place as a renewable and reliable energy source that serves national environmental, energy, and economic policy objectives. NHA's membership includes more than 240 companies, from Fortune 500 corporations to family-owned small businesses. NHA members include public and investor-owned utilities, independent power producers, developers, equipment manufacturers and other service providers. In the United States, hydropower plants

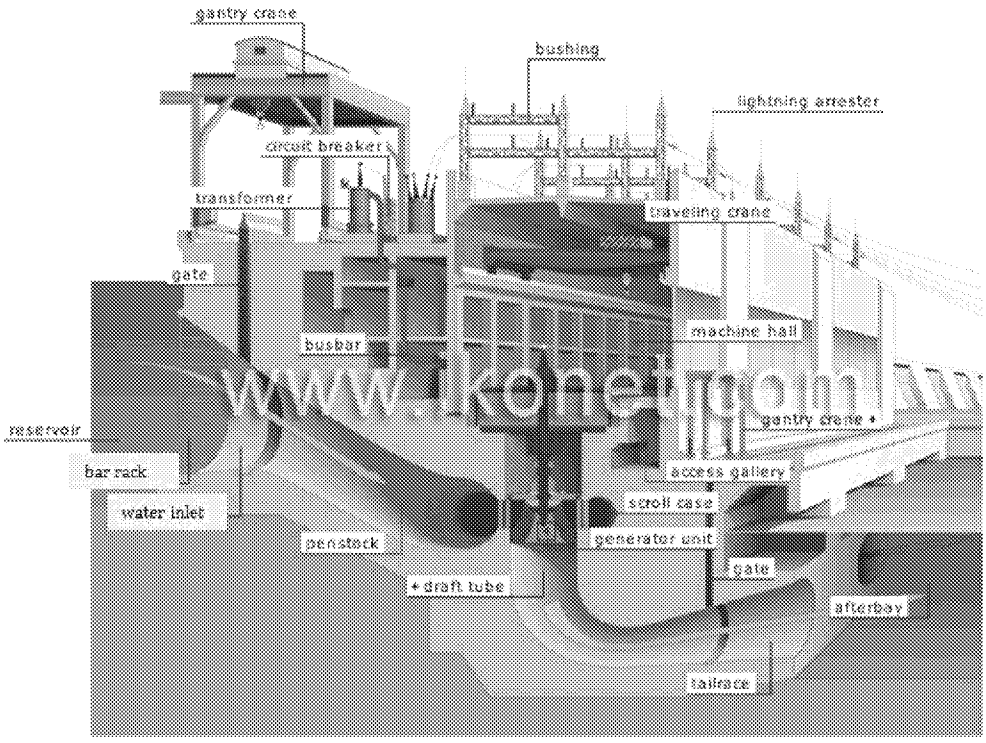
provide about 6 to 7 percent of the nation's total electric generation and pumped storage hydropower plants provide the vast majority of energy storage, approximately 97 percent. NHA's membership includes Idaho companies that will be directly affected by the Proposed Permit.

The Utility Water Act Group ("UWAG") is a voluntary, non-profit, unincorporated group of 146 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. UWAG members operate hydroelectric facilities, power plants, and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. One of UWAG's purposes is to participate on behalf of its members in EPA regulatory actions under the CWA and in litigation arising from those regulatory actions. UWAG's membership includes owners and operators of hydroelectric facilities that would be affected by the adoption and issuance of the Proposed Permit.

Hydroelectric facilities vary significantly in terms of design and configuration, especially when it comes to the pipes and structures that divert water for purposes of cooling. Generally, water diverted for cooling is primarily sourced from three locations within the hydroelectric facility: (1) the penstock – a closed conduit or pipe that conveys water from the reservoir to the turbine, (2) the turbine scroll case – a spiral-shaped steel structure distributing water flow through the wicket gates located just prior to the turbine, or (3) a water inlet port located on the face of the dam. There likely are exceptions to these locations, because each facility has a unique, location-specific design to take maximum advantage of the hydraulics of that location. An individual facility may use one design exclusively, or may use a combination of designs. After use for cooling, diverted water is transferred downstream primarily via these methods: (1)

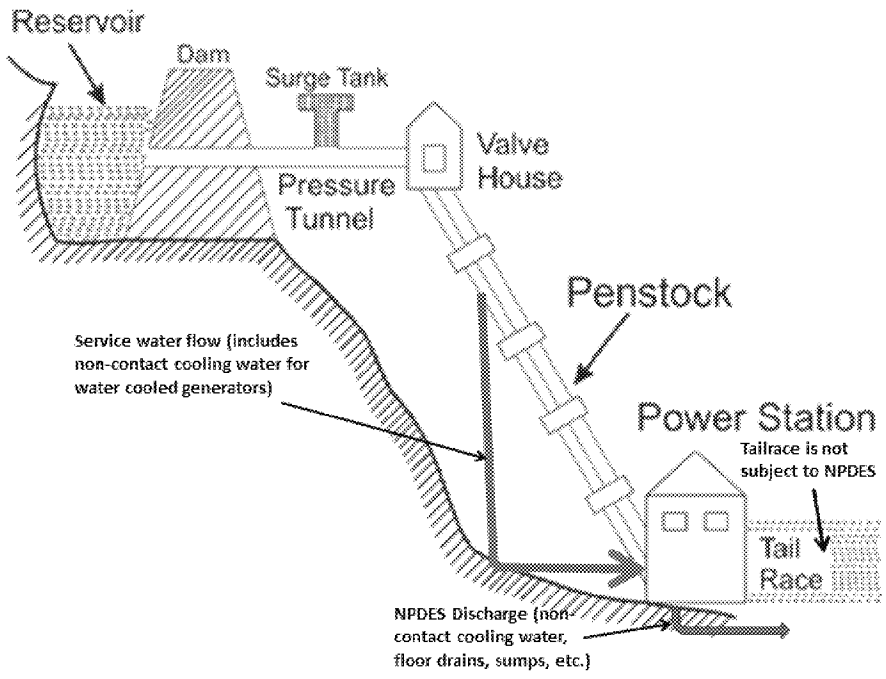
directed back to the penstock and re-used to generate electricity, (2) directed back to the scroll case (low head dams mainly) and re-used to generate electricity, (3) directed to the tailrace via the draft tube, or (4) direct transfer to the tailrace. The features of a typical hydroelectric facility are depicted in Figure 1, and an example of a facility diverting cooling water from the penstock is depicted in Figure 2.

Figure 1[3]



[3] The Visual Dictionary, Cross Section of a Hydroelectric Plant, www.ikonet.com.

Figure 2



Accordingly, hydroelectric generating facilities do not have CWISs in the conventional industrial context upon which the current § 316(b) regulations were developed. Hydroelectric facilities bring a wide variety of technical challenges associated with characterizing impingement and entrainment, and applying technologies that EPA considered in its 2014 rulemaking as available for on-shore facilities. This is evident in the 2014 Rule's definition of a CWIS. EPA's regulations define CWIS as "the total physical structure and any associated construction waterways used to withdraw cooling water from waters of the United States. The [CWIS] extends from the point at which water is first withdrawn from waters of the United States up to, and including the intake pumps." 40 C.F.R. § 125.92(f). The 2014 Rule envisions the use of pumps to actively *withdraw* cooling water from surface waters that are waters of the U.S., but this broad definition is inappropriate for hydroelectric facilities, which are diversion structures by design – impounding water and transporting/passing water along a contiguous waterway to

turn turbines used to generate electricity.[4] Relative to the total water transported through the facility, a very small amount of water is diverted for cooling. In general, cooling water accounts for less than 1% of the total water transported through the facility and in some cases less than 0.1%. For example, at the Keowee Hydro Station the cooling water is generally less than 0.01% of the total discharge flow.[5] As explained in further detail herein, given the wide range of configurations for hydroelectric facilities and different processes for diverting water for cooling, the best available technologies and sampling requirements imposed by EPA for steam electric power plants and manufacturing plants are not necessarily appropriate or practical for hydroelectric facilities. The Region 10 Proposed Permit fails to consider or account for these challenges.

II. EPA's Interpretation and Implementation of § 316(b) To Date

A. EPA's Prior Regulations Implementing § 316(b) Have Not Addressed Hydroelectric Facilities.

Section 316(b) provides:

> Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

33 U.S.C. § 1326(b).

EPA has implemented this provision by issuing regulations that establish BTA standards for intake structures that become binding for a particular facility only after the standards are incorporated into an NPDES permit for discharges from a regulated facility. At no point during

[4] Hydroelectric facilities do not have conventional CWIS and their configurations vary. These comments refer to the mechanisms that divert cooling water as intakes, pipes, or diversion structures.

[5] South Carolina NPDES Permit No. SC0000515, Fact Sheet and Permit Rationale at 18 (Mar. 16, 2011).

EPA's long history of implementing § 316(b) have EPA's regulatory actions addressed or evaluated the applicability of CWA § 316(b) to hydroelectric facilities.

In 1976, EPA issued its first § 316(b) rule, 41 Fed. Reg. 17,387 (Apr. 26, 1976), but the Fourth Circuit remanded it to EPA on procedural grounds. *Appalachian Power Co. v. Train*, 566 F.2d 451 (4th Cir. 1977). EPA's remaining rule and guidance instructed NPDES permit writers to make case-by-case determinations regarding BTA for CWIS at point sources subject to EPA standards established pursuant to §§ 301 or 306. *See* 40 C.F.R. § 401.14 ("The location, design, construction and capacity of cooling water intake structures of any point source for which a standard is established pursuant to section 301 or 306 of the Act shall reflect the best technology available for minimizing adverse environmental impact, in accordance with the provisions of part 402 of this chapter."); 33 U.S.C. § 1342(a)(1)(B).[6] By its terms, § 401.14 applies only to those point sources for which technology-based standards are established under §§ 301 and 306. By contrast, even where hydroelectric facilities require NPDES permits for discharges, the limits imposed are largely water quality-based.[7] Although § 401.14 has been in effect since 1976, generally, neither federal nor state NPDES permitting authorities read § 401.14 as applicable to hydroelectric facilities that are issued NPDES permits for minor equipment-related discharges.[8]

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[6] *See also* EPA, *Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) Public Law 92–500*, at 4 (1977) ("The environment-intake interactions in question are highly site-specific and the decision as to best technology available for intake design, location, construction, and capacity must be made on a case-by-case basis.").

[7] *See, e.g.*, Arkansas NPDES Permit No. AR0048755, Statement of Basis at 6-7 (Apr. 13, 2017); Arkansas NPDES Permit No. AR0048763, Statement of Basis at 7 (Sept. 4, 2013); West Virginia NPDES Permit No. WV0078859, App. A § I.12 (Aug. 9, 2016); South Carolina Department of Health and Environmental Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015).

[8] *See, e.g.*, NPDES General Permits for Hydroelectric Facilities in the States of Massachusetts and New Hampshire, Permit Nos. MAG360000, NHG360000 (Nov. 10, 2009); ADEM General Permit Rationale, Hydroelectric Facilities ALG360000 (Aug. 18, 2015); South Carolina Department of Health and Environmental Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015); North Carolina Department of Environment and Natural Resources, NPDES General Permit No. NCG50000 (Oct. 1, 2015). We are aware of one exception, discussed in note 38, infra.

Since 1976, EPA has issued a series of regulations implementing § 316(b) for new facilities, as well as existing steam electric plants and manufacturing facilities. The Phase I rule established national technology-based performance requirements for new facilities that withdraw greater than 2 MGD of surface water and use at least 25 percent of the water they withdraw for cooling purposes. 66 Fed. Reg. at 65,255 (Dec. 18, 2001). The Phase II rule set requirements for existing steam electric plants with flows greater than 50 MGD, 69 Fed. Reg. 41,576 (July 9, 2004), but certain aspects of the rule were invalidated by the U.S. Court of Appeals for the Second Circuit and later withdrawn.[9] The rules for lower flow steam electric plants and all manufacturing facilities (known as the Phase III rules) were also withdrawn. 71 Fed. Reg. 35,006 (June 16, 2006). In place of the Phase II and III rules, in 2014, EPA issued a single rule for existing facilities – the 2014 Existing Facilities Rule.[10]

During the development of the Phase I, II, and III rules, EPA never suggested that any of those rules would apply to hydroelectric facilities, whether or not the facilities use cooling water or need an NPDES permit. None of EPA's Information Collection Requests ("ICRs") were directed at hydroelectric facilities, nor did EPA use any other method to collect or consider information on cooling water diversion or use by hydroelectric facilities. Variations in the locations, design, and configurations of cooling water "intakes" unique to hydroelectric facilities were never contemplated in EPA's previous facility surveys or technology evaluations for promulgating § 316(b) regulations for new or existing power generating facilities. EPA did not consider whether hydroelectric facilities could feasibly monitor or otherwise assess entrainment or impingement mortality associated with cooling water diversion or whether those facilities

[9] *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007); 72 Fed. Reg. 37,107 (July 9, 2007).

[10] Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014).

could distinguish such mortality from mortality occurring by virtue of the passage of water through the turbines. Nor did EPA consider the availability, performance, or cost of technologies for reducing entrainment or impingement mortality that might be caused by hydroelectric facilities' cooling water "intakes," which often consist of one or more relatively small pipes diverting water from within or coming off of the penstock or draft tube of a hydroelectric facility or in some other location depending upon the broader facility design and operation.

The development of EPA's 2014 § 316(b) Rule was no different; EPA's ICR solicited no information from any hydroelectric facility.[11] As discussed below, EPA stated in the preamble to the proposed rule that water withdrawals for generation of electricity by hydroelectric facilities were not subject to the rule. *See* 76 Fed. Reg. 22,174, 22,190 (Apr. 20, 2011). As a result of this express and unambiguous statement, EPA received no comments regarding the potential applicability of CWA § 316(b) to hydroelectric facilities or addressing the potential impacts of applying the proposed technology requirements to hydroelectric facilities. Indeed, in the final 2014 Existing Facilities Rule, EPA estimated that a total of 1,065 facilities (544 electric generators and 521 manufacturers) would be subject to the Rule. 79 Fed. Reg. at 48,305. None of those facilities were hydroelectric power generators.[12] Thus, EPA never collected the necessary information to evaluate impacts of the Rule on hydroelectric facilities, even though some hydropower generators divert more than 2 MGD and use 25 percent or more of the diverted water for cooling purposes.

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[11] *See* Information Collection Request (ICR) for CWIS at Existing Facilities (Final Rule), OMB Control No. 2040-0257, EPA ICR No. 2060.07 (Aug. 2014).

[12] 2014 TDD at 4-24 ("From the universe of facilities with a steam electric prime mover and based on data collected from EPA's industry technical questionnaires and the compliance requirements for the final rule, EPA has identified 544 facilities to which the proposed rule is expected to apply.").

The 2014 Rule establishes requirements for existing facilities that: (1) have NPDES permits, (2) use one or more CWISs with a cumulative design intake flow ("DIF") of greater than 2 MGD to withdraw water from waters of the U.S., and (3) use 25 percent or more of the water withdrawn (on an actual intake flow basis) exclusively for cooling water purposes. 40 C.F.R. § 125.91(a). Facilities with CWISs that are subject to CWA § 316(b) that do not meet these criteria must meet § 316(b) requirements established by the permit writer on a case-by-case, BPJ basis. 40 C.F.R. § 125.90(b). EPA's final 2014 Existing Facilities Rule made no mention of hydroelectric facilities in the preamble or regulatory text.

B. The Proposed NPDES General Permit Inappropriately Seeks to Apply § 316(b) Requirements to Hydroelectric Facilities.

The Proposed Permit[13] would apply only to facilities below the 2 MGD and 25 percent cooling water threshold. Proposed Permit Fact Sheet at 28.[14] The Fact Sheet indicates that facilities above the 2 MGD and 25 percent cooling water threshold would have to obtain an individual NPDES permit, and (assuming the individual permit is a federal permit issued by Region 10) an individual § 401 water quality certification, and comply with the comprehensive requirements of the 316(b) Rule. *Id.* For facilities below the 2 MGD and 25 percent cooling

[13] The timing of the Proposed Permit coincides with the announcement that EPA has approved the application by the State of Idaho to administer and enforce the Idaho Pollutant Discharge Elimination System ("IPDES") program regulating discharges of pollutants into waters of the United States under its jurisdiction. 83 Fed. Reg. 27,769 (June 14, 2018). Under a Memorandum of Agreement ("MOA") between the Idaho Department of Environmental Quality and EPA Region 10, EPA will transfer the administration of specific program components to the State over a four-year period. Idaho will assume NPDES permitting and enforcement authority for general permits, such as the proposed general permit for wastewater discharges from hydroelectric generating facilities, by July 1, 2020.

[14] As discussed on page 31, the text of the Proposed Permit is inconsistent with the Fact Sheet and the 401 Water Quality Certification in its discussion of the thresholds facilities must meet to qualify for the permit (i.e., whether facilities above the 2 MGD *and* 25 percent cooling water threshold are ineligible or whether facilities that meet either the 2 MGD *or* 25 percent cooling water thresholds are ineligible). For purposes of these comments, we are assuming that Region 10 intended that facilities that are ineligible for coverage under the Proposed Permit are those facilities that use greater than 2 MGD *and* use 25 percent or more of the water for cooling purposes.

water threshold, the Proposed Permit would set BTA requirements that must be implemented within 180 days of the effective date of the permit, including, for example:

- manage tailrace operations to prevent fish access to the draft tube areas;
- cease or reduce the intake of cooling water whenever withdrawal of source water is not necessary, *i.e.*, during equipment testing or maintenance activities;
- return all observed live impinged fish to the source water to the extent practicable;
- conduct weekly monitoring to identify what species are impinged;
- maintain a physical screening or exclusion technology consistent with NMFS Northwest Region's Anadromous Salmonid Passage Facility Design guidelines; and
- properly operate and maintain CWIS, including any existing technologies to minimize impingement and entrainment.[15]

In addition, permittees also would have to prepare a report to be submitted to Region 10 at least 180 days prior to permit expiration that would include extensive information regarding the CWIS and source waterbody, including, for example:

- if the combined design capacity of all CWISs is greater than 1 MGD, the measures to be taken by the facility to maintain a daily maximum surface water withdrawal of 1 MGD;
- maximum monthly average intake of the CWIS during the previous five years;
- whether the facility withdraws cooling water at a rate commensurate with a closed-cycle cooling system;
- maximum through-screen design intake velocity;
- detailed description of screening and exclusion technology employed to prevent impingement and entrainment at the CWIS; and
- report of the prior five-year results from the required impingement and entrainment monitoring program.[16]

The Fact Sheet states, "EPA will use this information to assess the potential for impingement and entrainment at the CWIS, evaluate the appropriateness of any proposed

[15] Proposed Permit, § IV.C.2.

[16] Proposed Permit, § IV.C.3.

technologies or mitigation measures, and determine any additional requirements to place on the facility's CWIS in the next permit cycle." Proposed Permit Fact Sheet at 28-29. The Idaho Department of Environmental Quality ("IDEQ") has certified that, if the permittee complies with the terms and conditions of the Proposed Permit and the conditions set forth in the water quality certification, "there is reasonable assurance" the covered hydroelectric facilities' discharges "will comply with the applicable requirements" of the CWA and Idaho Water Quality Standards.[17]

The Region provides no analysis or support for applying § 316(b) requirements to hydroelectric facilities. The Fact Sheet demonstrates that the Region relied on and drew heavily from EPA's 2014 Rule in establishing CWIS-related requirements in the Proposed Permit. *See* Proposed Permit Fact Sheet at 28. But nowhere in the Proposed Permit or Fact Sheet does the Region provide any support or independent analysis for the measures it proposes to require for hydroelectric facilities.

III. CWA § 316(b) Does Not Apply to Hydroelectric Facilities.

A. Hydroelectric Generation Facilities Are Not Subject to CWA § 316(b).

By its terms, § 316(b) applies only where EPA establishes standards under §§ 301 and 306 for point sources. Unlike the other facilities to which EPA has applied § 316(b), EPA has not established such technology-based limitations and standards for hydroelectric facilities, nor would it be reasonable to do so given the *de minimis* nature of their discharges. As the United States Supreme Court has recognized, absent clear direction from Congress, courts will view (and agencies should view) with skepticism statutory interpretations that extraordinarily expand regulatory jurisdiction. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). Interpreting CWA § 316(b) to apply to hydroelectric generation facilities would be a significant

[17] IDEQ Draft § 401 Water Quality Certification for NPDES Permit Number IDG360000 (Mar. 29, 2018).

expansion of EPA's regulatory jurisdiction and would duplicate other federal and state requirements specifically designed to address these environmental impacts.

The limited legislative history for § 316(b) indicates that Congress did not intend for § 316(b) to apply to hydroelectric facilities. From November 1971 to October 1972, Congress considered various bills that eventually would become the CWA. On September 28, 1972, the conference committee substantially amended § 316, modifying that provision to insert for the first time a provision addressing cooling water intakes structures, and submitted its report for approval by both the House and Senate.[18] During the House of Representatives consideration of the conference report, Rep. Donald Clausen (R-CA1) made the following statement in support:

> Section 316 was originally included in the House-passed water pollution control bill because of the belief that the arguments which justified a basic technological approach to water quality control did not apply in the same manner to the discharges of heat.... [S]team-electric generating plants are the major source of the discharges of heat.... Section 316(b) requires the location, design, construction, and capacity of cooling water intake structures *of steam-electric generating plants* to reflect the best technology available for minimizing any adverse environmental impact.[19]

Rep. Clausen's statement indicates that Congress intended § 316(b) to apply to steam electric generating plants, not hydroelectric generating facilities that harness the power of falling or fast-moving water to drive turbines to produce electricity.[20] In contrast, steam electric power plants heat water into steam that drives the electric-generating turbines, typically requiring considerably more cooling water to safely operate the facility. It is these facilities that were Congress' focus when it promulgated CWA § 316(b).

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[18] *See* H.R. Rep. No. 92-1465, at 68, 137 (Sept. 28, 1972).

[19] House Consideration of the Report of the Conference Committee (Oct. 4, 1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 262–64 (1973) (statement of Rep. Clausen) (emphasis added).

[20] We recognize that some U.S. Courts of Appeals have held that § 316(b) applies to other industrial facilities that use cooling water beyond steam electric plants (*e.g.*, iron and steel). *See, e.g., Appalachian Power Co. v. Train*, 566 F.2d 451, 457-58 (4th Cir. 1977). But those decisions did not consider whether all facilities that must obtain an NPDES permit are subject to § 316(b).

In promulgating CWA § 316(b), Congress would have understood, as discussed in more detail below, that other statutes and regulations governed consideration of environmental impacts from water diversion structures. For example, Congress would have been well aware that the Federal Power Act ("FPA") licensing process for hydroelectric facilities requires evaluation of environmental impacts and conditions to protect and mitigate impacts to fish and wildlife-related habitat. Congress gave no indication that it intended such facilities to be subject to additional requirements under CWA § 316(b), nor would such requirements have made sense in light of the other mechanisms in place under the FPA. There is no evidence that Congress intended CWA § 316(b) to apply to hydroelectric facilities, and, indeed, the limited legislative history for that provision indicates that Congress intended § 316(b) to address adverse environmental impacts associated with industrial facilities, such as steam electric generating facilities, for which the statute requires EPA to establish nationally applicable effluent limitations guidelines and new source performance standards. There is no basis in the statute for EPA's new interpretation that § 316(b) can apply to hydroelectric facilities.

B. Establishing § 316(b) Requirements for CWISs at Hydroelectric Facilities Would Conflict With and Duplicate Other Federal and State Requirements Already in Place.

The statutory scheme Congress established under the FPA, and other federal statutes, demonstrates Congress' intent that the Federal Energy Regulatory Commission ("FERC") address, through the FERC hydropower licensing process, all issues relating to the use of water by non-federal hydroelectric facilities, including any water quality issues raised by a State CWA § 401 certification.[21]

[21] This section focuses on hydroelectric projects that require FERC authorization because those are the most common facilities for our members. Certain non-federal hydroelectric facilities, such as small projects (5 MW or less) or projects conducted on an existing conduit (*e.g.*, irrigation canal), do not require FERC licensing because those projects would result in minor environmental effects (*e.g.*, projects that involve little change to water flow and

The comprehensive development standard of FPA § 10(a)(1) requires that licensed hydroelectric projects be best adapted to a comprehensive plan for improving or developing a waterway, including, among other uses, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat). 16 U.S.C. § 803(a)(1). Section 10(a)(1) grants FERC the authority to require the modification of any project and of the plans and specifications of the project works before approval. Thus, to the extent that participating resource agencies, which are actively involved in the licensing process, identify during licensing significant issues relating to impacts from diversion and use of cooling water at hydroelectric facilities, those impacts would be considered by FERC in ensuring that the project will be best adapted to a comprehensive plan.

Section 10(j) of the FPA provides for the full participation of federal and state fish and wildlife agencies in recommending conditions for the protection, mitigation, and enhancement of fish and wildlife resources affected by the development, operation, and management of the hydroelectric project.[22] Such conditions are based on recommendations received pursuant to the Fish and Wildlife Coordination Act from NMFS, the U.S. Fish and Wildlife Service ("FWS"), and state fish and wildlife agencies. As part of the application for a hydroelectric license (or relicense), applicants must submit an environmental report to FERC describing the fish and wildlife that occur within the vicinity of the project and downstream areas affected by the

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use and are unlikely to affect threatened and endangered species), but they are still subject to a similar process and subject to mandatory terms and conditions set by federal and state fish and wildlife agencies and by the Commission. 18 C.F.R. § 4.30. Other federal, non-FERC regulated hydroelectric facilities are generally authorized by Congress and owned by the U.S. Bureau of Reclamation or the U.S. Army Corps of Engineers and in some circumstances must comply with National Environmental Policy Act provisions regarding impacts to aquatic resources associated with operational changes, as well as formally consult with the U.S. Fish and Wildlife Service where federally threatened and endangered species are potentially impacted.

[22] 16 U.S.C. § 803(j)(1).

project, and must identify any federally listed threatened or endangered species.[23] The same report also must describe any measures recommended by consulting fish and wildlife agencies for mitigating such impacts and protecting fish and wildlife.[24]

Additional requirements to evaluate potential impacts to aquatic species exist under the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"). Pursuant to ESA § 7 and FERC's corresponding regulations, FERC has an obligation to ensure that any project it authorizes is not likely to jeopardize the continued existence of any federally listed endangered or threatened species.[25] To satisfy this requirement, FERC directs project sponsors to engage in informal consultation with NMFS and/or FWS to determine whether the project will impact a federally listed species.[26] Unless NMFS or FWS concludes that the proposed hydroelectric facility is not likely to adversely affect federally listed species, the project sponsor must prepare a Biological Assessment containing the results of detailed surveys, potential impacts, and proposed mitigation to eliminate or minimize such impacts.[27] Where the consulting agency concludes that the project will result in the "incidental take"[28] of listed species, NMFS or FWS will prepare a Biological Opinion that may include reasonable and prudent measures to avoid jeopardy and must include a statement specifying the impact (*i.e.*, the amount or extent of incidental take), and reasonable and prudent measures considered necessary or appropriate to minimize the take of listed species.[29] Through this process, FERC will

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[23] 18 C.F.R. §§ 4.51(f), 4.41(f).

[24] *Id.*

[25] 16 U.S.C. § 1536.

[26] 18 C.F.R. § 380.13.

[27] *See* 18 C.F.R. § 380.13(b).

[28] "Incidental take" refers to "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity." 50 C.F.R. § 402.02.

[29] *See* 16 U.S.C. § 1536(b)(4); *see also* 50 C.F.R. § 402.15(i).

determine, in consultation with federal fish and wildlife agencies, which conservation and mitigation measures should be implemented to minimize impacts. In other words, the ESA process frequently results in the imposition of measures to protect listed species that might be impacted by operations of hydroelectric facilities, including the diversion of cooling water.

NEPA review requires the development by FERC of a Finding of No Significant Impact ("FONSI"), an Environmental Assessment ("EA"), or an Environmental Impact Statement ("EIS") for a project. Entrainment, impingement, and other impacts on fish and wildlife are analyzed in these environmental documents. For example, within the EA for a hydroelectric project in Arkansas, FERC concluded that "[b]ased upon [Arkansas Game and Fish Commission] observations, current levels of turbine entrainment and mortality of fish is [sic] not considered to be a significant issue at these projects."[30] Likewise, comprehensive entrainment studies were developed as part of the application process for the Catawba-Wateree and Yadkin-Pee Dee, hydroelectric projects spanning the Carolinas. The EIS for the Catawba-Wateree project found that "entrainment does not appear to adversely affect survival and growth of young of target sport and forage species populations,"[31] and the EIS for the Yadkin-Pee Dee project found that there is "no indication that entrainment is having significant adverse effects on resident fish populations, because project reservoirs and riverine reaches support robust fish populations and an excellent sport fishery."[32] Similarly, for the Smith Mountain Hydroelectric Plant, a pumped storage facility in Virginia, an entrainment study qualitatively evaluated entrainment for selected species based on reservoir and turbine intake characteristics, water

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[30] FERC, Environmental Assessment for Hydropower License, Project No. 271-062, at 66 (Dec. 2001).

[31] FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2232, at 178 (July 2009).

[32] FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2206, at 138 (Apr. 2008).

velocity and swim speed data, and life history characteristics.[33] FERC concluded in the EIS for the project that the "loss of individual fish from entrainment and mortality is not expected to result in any substantial effects to the fishery at the Project."[34] The analyses above address entrainment associated with all water passing through the projects, including the enormous amounts of water that go through the turbines for electricity generation. While these studies generally do not focus on entrainment specific to the small pipes and other structures – often within or off of the penstocks – that various hydroelectric facilities use to divert water for service water and cooling purposes, withdrawals and entrainment impacts from these cooling water diversions would be exceptionally smaller. In addition, FERC frequently addresses the issue of fish impingement and entrainment by requiring licensees to screen their intakes to prevent or minimize fish from entering the penstock, which can eliminate or reduce the possibility of impingement or entrainment during the diversion of water from the penstock for cooling purposes.

Furthermore, CWA § 401 provides states broad authority to impose conditions as part of state-issued water quality certificates in the context of the licensing and relicensing of projects. FERC may not issue a license unless the state has either issued or waived the water quality certificate. States have used this authority to impose conditions related to fisheries, aesthetics, recreation, and more.[35] Such conditions are considered "mandatory," meaning that FERC has no discretion but to include them in a license.

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[33] *See* FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2210, at 119-126 (Aug. 2009).

[34] *Id.* at 126.

[35] *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) (holding FERC-licensed dams must comply with state certification that required operator to maintain stream flow and allow passage for certain fish and eels).

In accordance with the authorities described above, fish and wildlife agencies often recommend protection, mitigation, and enhancement measures to offset any known impacts of hydroelectric facilities for aquatic species. In some cases, FERC license conditions may go further than the 2014 Rule would to minimize adverse environmental impacts associated with hydroelectric operations because they can include habitat restoration which, although not allowed as BTA for steam electric and manufacturing facilities captured under the Existing Facilities Rule, serves to provide habitat for individual species, life stages (such as spawning and rearing of young), or entire communities of aquatic organisms affected by hydroelectric operations. Thus, the FERC licensing process already provides for measures to minimize adverse environmental impacts of hydroelectric operations and may, at times, be more stringent than § 316(b) requirements. Any imposition of § 316(b) requirements, either through application of the 2014 Rule or a case-by-case BPJ determination, would be duplicative of existing federal and state requirements already in place. As the Alabama Department of Environmental Management ("ADEM") has recognized, "[t]he purpose of 316(b) of the [CWA] is to reduce mortality to fish and other aquatic organisms impacted by cooling water intake structures," but, for hydroelectric facilities, "the impacts to aquatic organisms are already addressed" and "have been extensively studied under the [NEPA] and [FERC] regulatory frameworks and subsequently granted 401 certifications."[36]

IV. EPA's 2014 Rule for Existing Facilities Did Not Consider Hydroelectric Facilities.

Even if CWA § 316(b) were applicable to hydroelectric facilities, which it is not, the Region's proposed BPJ requirements are arbitrary and capricious because the Region borrowed from and relies on a rule that EPA expressly stated did not apply to hydroelectric facilities and

[36] *See* ADEM General Permit Rationale, Hydroelectric Facilities ALG360000, at 3 (Aug. 18, 2015).

that the Agency adopted without any consideration of the technical feasibility or cost of application to hydroelectric facilities.

A. EPA Has Never Provided Notice or an Opportunity to Comment on the Applicability of § 316(b) Requirements to Hydroelectric Facilities.

Under the APA, 5 U.S.C. § 553(b)(3), an agency must publish in the *Federal Register* a notice of proposed rulemaking, which "shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved." After the notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). The APA's notice-and-comment mandate is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of America v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). These procedures "ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994).

To ensure regulated entities have fair notice, "the final rule the agency adopts must be a 'logical outgrowth' of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). Under this principle, the law asks "whether the affected party 'should have anticipated' the agency's final course in light of the initial notice." *Covad Commc'ns. Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (citation omitted). While a final rule need not be an exact replica of the proposed rule, "if the final rule deviates too sharply from the proposal,

affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

As explained above, prior to the implementation of the 2014 Rule, there had never been any indication from EPA or Congress that CWA § 316(b) could apply to hydroelectric facilities. Moreover, there was no way to anticipate from the proposed Existing Facilities Rule that EPA would apply the technology-based standards to hydroelectric facilities. Hydroelectric facilities had no notice that those facilities could be subject to new NPDES requirements as a result of the 2014 rulemaking, nor were they provided an opportunity to comment on the many ways in which technologies that EPA evaluated for steam electric power and manufacturing plants cannot be considered BTA for hydroelectric facilities. In the preamble to the proposed rule for existing facilities, EPA explicitly stated that withdrawals from hydroelectric facilities were not meant to be addressed by the Existing Facilities Rule:

> Given the diversity of industrial processes across the U.S., there are many other industrial uses of water not intended to be addressed by today's proposed rule . . . Warming water at liquefied natural gas terminals, and *hydro-electric plant withdrawals for electricity generation are not cooling water uses and are not addressed by today's proposal* . . . .

76 Fed. Reg. at 22,190 (emphasis added).

In light of EPA's history of *not* applying CWA § 316(b) to hydroelectric facilities and because EPA's explicit statements confirmed that hydroelectric facilities would not be covered by the Existing Facilities Rule, private and public entities that own or operate hydroelectric facilities did not provide comments to address the potential impacts of the Existing Facilities Rule's proposed requirements.[37] Applying the Existing Facilities Rule to hydroelectric facilities, therefore, cannot be a logical outgrowth of the proposed rule. Thus, any attempt now by EPA to

[37] There is no reference to hydroelectric facilities in EPA's 467-page response to comments document. Response to Comments Document for the Final 316(b) Existing Facilities Rule (May 19, 2014) (EPA-HQ-OW-2008-0667-3679).

apply the Rule's requirements to hydroelectric facilities, which has been done only on rare occasions through post hoc determinations for particular facilities[38] and now in the Proposed Permit, is contrary to the APA's requirements for fair notice and opportunity for comment.

B. EPA Did Not Consider Technologies for Hydroelectric Facilities or Evaluate the Potential Impacts of Applying the Rule's BTA Standards to Hydroelectric Facilities.

EPA's final 2014 Rule and preamble provide no discussion of the applicability of § 316(b) or the Rule to hydroelectric facilities. In fact, the administrative record for the 2014 Rule is replete with indications that EPA did not consider impacts to hydroelectric facilities when evaluating potential technologies or the associated costs and benefits. For example, in the Economic Analysis for the final 2014 Rule, EPA stated that "[t]he final rule is only relevant for power generators that use substantial amounts of cooling water, and …[o]nly prime movers with a *steam-electric generating cycle* use large enough amounts of cooling water to be subject to the final rule."[39] The analysis goes on to describe steam electric facilities as those generating units

[38] In one of the few instances where EPA has asserted that § 316(b) and the 2014 Rule apply to hydroelectric facilities, it is clear that EPA's determination was made behind the scenes, well after the 2014 Rule was promulgated, and without a notice-and-comment rulemaking that evaluated the potential implications of such a determination. The 2016 NPDES Permit Fact Sheet for the Smith Mountain Hydroelectric Plant in Virginia stated, "Significant discussion was held during this reissuance regarding the applicability of CWA section 316(b). [The applicant's] position is that hydropower stations are not subject to section 316(b). However, after consultation with EPA, a determination was made that the facility is subject to CWA 316(b) and the [Existing Facilities] Rule. The determination was that § 316(b) 'applies' to hydropower facilities if waters of the U.S. are withdrawn and used for cooling purposes." VPDES Permit Program Fact Sheet, Permit No. VA0088765, at ¶ 30 (June 13, 2016). Other states that have considered the issue have determined that § 316(b) does not apply to hydroelectric facilities, *see, e.g.,* ADEM General Permit Rationale, Hydroelectric Facilities ALG360000 (Aug. 18, 2015) (ADEM agrees that the § 316(b) rule is "not applicable" to hydroelectric facilities), or have continued to issue NPDES permits for hydroelectric facilities without § 316(b) requirements, *see, e.g.,* South Carolina Department of Health and Environmental Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015); North Carolina Department of Environment and Natural Resources, NPDES General Permit No. NCG50000 (Oct. 1, 2015).

[39] Economic Analysis for the Final 316(b) Existing Facilities Rule at 2A-4 (May 2014) (emphasis added) ("2014 Economic Analysis").

that are fueled by "coal, gas, oil, waste, nuclear, geothermal, and solar steam."[40] EPA does not include hydroelectric facilities in its analysis of the economic impact of the Rule on electric generation units, nor does EPA analyze the economic impact of the rule on hydroelectric facilities, in particular.[41] Likewise, in the Technical Development Document for the 2014 Rule, EPA includes the following exhibit that provides the estimated number of facilities that would be subject to the 2014 Rule by fuel type and prime mover category, but the table does not include hydroelectric facilities:

Exhibit 4-26. 316(b) electric power facilities by plant type and prime mover

Plant type[a]	Prime mover	Number of 316(b) electric generators[b,c]
Coal steam	Steam turbine	342
Gas	Steam turbine	73
Nuclear	Steam turbine	56
Oil	Steam turbine	29
Other steam	Steam turbine	25
Total steam	Steam turbine	525
Combined cycle	Combined cycle	33
Total		559

[a] Facilities are listed as steam electric if they have at least one steam electric generating unit.
[b] Facility counts are weighted estimates generated using the original 316(b) survey weights.
[c] Individual values do not sum to reported total due to rounding as the result the application of statistical weights.
Sources: U.S. EPA, 2000; U.S. DOE, 2007 (GenY07); U.S. EPA Analysis, 2010

2014 TDD Exhibit 4-26.

Similarly, EPA's benefit analyses did not consider hydroelectric facilities. To evaluate the benefits of the 2014 Rule's requirements, EPA extrapolated data from 98 model facilities based on information EPA received in the 2000 ICR.[42] In its 2000 ICR, however, EPA did not request information from any hydroelectric facilities. EPA ultimately narrowed its research

[40] *Id.*; *see also* Technical Development Document for Final Section 316(b) Existing Facilities Rule at 4-23 (May 19, 2014) ("2014 TDD") ("Only prime movers with a steam-electric generating cycle use large enough amounts of cooling water to fall under the scope of the proposed rule.").

[41] In fact, the only discussion of hydroelectric facilities in EPA's Economic Analysis is a general description of hydroelectric facilities' contribution to electricity generation. *See* 2014 Economic Analysis at 2A-3.

[42] *See* Benefits Analysis for the Final Section 316(b) Existing Facilities Rule at 3-5 (May 2014).

activities to focus on traditional utilities, nonutility power producers, and four other industrial categories that utilize large quantities of cooling water. "Traditional utilities and nonutility power producers that use cooling water were further limited to those plants that generate electricity by means of steam as the thermodynamic medium (steam electric) because they are associated with large cooling water needs."[43] Therefore, hydroelectric facilities, which do not generate electricity through the use of steam, were excluded from EPA's original data request, which was later used to support EPA's analysis of the Existing Facility Rule's benefits.

In fact, EPA concluded that "[u]nits with water turbines, or 'hydroelectric units,'... do not use a steam loop and do not use cooling water ...."[44] As Region 10 now appears to understand, hydroelectric facilities occasionally do use cooling water, although they do so in small amounts, and their use of cooling water certainly was not the focus of the 2014 Rule.

If EPA had actually considered the technical feasibility and cost for application requirements and any technology and associated monitoring requirements for hydroelectric facilities, it would have understood that what is BTA for steam electric power and manufacturing plants is not necessarily BTA for hydroelectric facilities. EPA previously has recognized that a different BTA may be appropriate for other types of facilities with CWISs. For example, EPA determined that, for existing offshore oil and gas platforms, no retrofit technology was BTA. EPA studied the facilities and "could not identify any technologies (beyond the protective screens already in use) that are technically feasible for reducing impingement or entrainment in such existing facilities." 79 Fed. Reg. at 48,310. As discussed in more detail in Section IV.B below, there are similar challenges for hydroelectric facilities.

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[43] Information Collection Request, Detailed Industry Questionnaires: Phase II Cooling Water Intake Structures & Watershed Case Study Short Questionnaire at 4 (Aug. 18, 1999).

[44] 2014 TDD at 4-22.

EPA cannot impose § 316(b) requirements on hydroelectric facilities without engaging in proper notice-and-comment rulemaking that evaluates the availability and feasibility of potential technologies for hydroelectric facilities. Region 10's Proposed Permit and Fact Sheet do not fulfill this requirement. Accordingly, it is unlawful for Region 10 to impose on hydroelectric facilities CWA § 316(b) requirements – whether they are based on BPJ determinations or the 2014 Rule – without following the necessary procedures or conducting this type of evaluation.

V. Even if § 316(b) Did Apply to Hydroelectric Facilities, Which it Does Not, the Requirements of the 2014 Rule Are Not Appropriate for Such Facilities, Which Are Fundamentally Different From Facilities Covered by the Rule.

The requirements that EPA established in the 2014 Rule are not appropriate for hydroelectric facilities, which are fundamentally different from the steam electric power and manufacturing plants EPA considered in that rulemaking.

As discussed above, EPA did not consider hydroelectric facilities in establishing BTA in its 2014 Rule. EPA explained in the preamble to the 2014 Rule that, to establish BTA for the facilities covered by the Rule, EPA considered: "the availability and feasibility of various technologies," "costs associated with these technologies," the technologies' economic impacts, "effectiveness of these technologies in reducing impingement mortality and entrainment," and additional factors, such as "location, age, size, and type of facility." 79 Fed. Reg. at 48,328. For this analysis, EPA made a number of assumptions based on data and information from steam electric power plants and manufacturing plants that do not take into account technology costs or feasibility for hydroelectric facilities.[45]

[45] For example, in evaluating impingement data and performance standards, EPA relied on 26 impingement mortality data sets at 17 facilities, none of which included hydroelectric facilities. 79 Fed. Reg. at 48,323; 2014 TDD Exhibit 11-3. As another example, in the final rule, EPA adjusted its assumptions for costs of modified traveling screens with fish returns in response to feedback that its proposal had underestimated those costs. 79 Fed. Reg. at 48,324. The adjustments EPA made in its evaluation of technology costs included: to correct its misplaced assumption that modified traveling screens were available at most facilities, EPA assigned higher cost technologies (*e.g.*, larger intakes, wedgewire screens with through-screen design velocities of 0.5 fps) for intakes that use passive

The assumptions that EPA made for the facilities it considered in its 2014 Rule do not necessarily apply for hydroelectric facilities. There are numerous different configurations for hydroelectric facilities and, in particular, their pipes and structures that divert cooling water. Nearly every facility has unique, location-specific design attributes to take maximum advantage of the hydraulics of that unique physical location. For example, some hydroelectric facilities have a hole bored through the penstock in which a perforated flange is used to attach a small pipe used to gravity feed service and cooling water equipment. Some hydroelectric facilities have pipes that come off the scroll case. Others have separate pipes that come off the face of the dam. For these three configurations, water that is gravity- or pressure-induced feeds through the pipe to cool and service the equipment. Other facilities have separate intake pump houses upstream of the powerhouse. For those facilities, there is a distinct and separate intake used for service water and cooling purposes. Pumped storage facilities pump water from lower reservoirs to higher elevation reservoirs during times of low electric demand and then release water from the upper reservoir to drive turbines during periods of high electric demand. In one pumped storage facility, cooling water is drawn from the cavity between the inner and outer walls of the power house, while service water is drawn from a single intake at the tailrace of the plant.

Given the wide range of configurations for hydroelectric facilities and different processes for diverting water for cooling, the technologies that EPA found to be the best available technologies and sampling requirements for steam electric power plants and manufacturing plants are not necessarily appropriate or practical for hydroelectric facilities.

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screens; EPA increased capital costs for the fish return component and included additional costs for those with particularly difficult circumstances, such as very long intake canals and submerged offshore intakes. *Id.*; 2014 TDD at 8-2 to 8-6 (explaining EPA's model facility approach and modifications to the cost tool). EPA did not consider application of the technology to hydropower facilities.

For example, at many hydroelectric facilities, conducting impingement or entrainment sampling at the pipe or structure taking in cooling water would be very difficult, or even unsafe, due to turbulence. Sampling equipment may not be able to withstand water flows and forces and could break away, potentially damaging the facility.

In addition, many of the impingement technology options that are established as BTA in the 2014 Rule would not be feasible at most hydroelectric facilities. For example, one of the impingement options is to use a maximum 0.5 feet per second through-screen design velocity, 40 C.F.R. § 125.94(c)(2), but for many hydroelectric facilities, the only way to retrofit an intake pipe within the penstock to meet that through-screen design velocity would be to increase the size of the intake opening, which in some cases would require dam reconstruction and could actually increase entrainment because of the increase in the volume of water passing through the intake. Similarly, another impingement option is to operate an intake structure with a maximum through-screen velocity of 0.5 feet per second, § 125.94(c)(3), but it would be impossible to measure the actual velocity at the intake for most hydroelectric facilities because the magnitude and force of the water is so great as it is going through the penstock that no monitoring equipment could be located near the intake. Nor would it be feasible to install modified traveling screens, § 125.94(c)(5), on the small pipes that are used by many hydroelectric facilities to take in cooling water. At least three of the impingement options, §§ 125.94(c)(5)-(7), require an impingement technology performance optimization study, which would be very difficult, if not impossible, for many hydroelectric facilities that would not be able to conduct impingement sampling at the intake.

Indeed, the 2014 Rule's requirements would not be necessary in most cases because the rates of impingement and entrainment would be so low that additional controls would not be

warranted. Some hydroelectric facilities have in place screens to prevent debris of a certain size from entering the penstock (and therefore the cooling water pipe), and at many facilities, the water passes through a strainer before being used for cooling purposes. Some of these strainers are backwashed to a plant sump. In our members' experience, fish are rarely (if ever) observed in strainer baskets or in backwash to the plant sump. Moreover, for many hydroelectric facilities, due to the high velocity and volume of water passing through the penstock and by the entrance to the intake, the rates of impingement would be so low that additional impingement controls would be useless. The same is true for entrainment at many of these facilities. For hydroelectric facilities, the *de minimis* exception for impingement established in the 2014 Rule, 40 C.F.R. § 125.94(c)(11), would be applicable more often than not. And the fact that there is not a *de minimis* exception for entrainment in the 2014 Rule would create issues for many hydroelectric facilities that would have no way of further minimizing the already very minor rates of entrainment.

EPA clearly did not consider hydroelectric facilities when it was establishing the requirements under the 2014 Rule. As explained above, such requirements are not appropriate or feasible for hydroelectric facilities, which are fundamentally different from facilities covered by the 2014 Rule.

VI. The § 316(b) Measures Required in the Proposed General Permit Are Inappropriate for Hydroelectric Facilities.

Even if § 316(b) applied to hydroelectric facilities, which it does not, the measures that Region 10 proposes as BTA in the Proposed Permit are inappropriate for the hydroelectric facilities to which the Proposed Permit, if finalized, would apply. As Region 10 acknowledges,

each generating facility is unique in its location, physical layout, and operational pattern.[46] The documentation Region 10 has supplied provides no information on the specific attributes of the "intake structures" used to supply cooling water used by the hydroelectric facilities to which any final permit would apply. Indeed, the Fact Sheet reflects no attempt to characterize or consider the wide range of variation among existing cooling water intakes at hydroelectric facilities. That variation is important because site-specific factors may make it difficult or impossible for many facilities to comply with some or all of the proposed requirements.

The Region also made no effort to assess whether those intakes, as currently configured and operated, are causing any meaningful environmental impacts not already minimized in the licensing and NEPA review process. It is difficult to understand how Region 10 could have exercised its BPJ that the intake of cooling water at hydroelectric facilities requires further control without first collecting at least some information from which to evaluate whether the diversion of relatively small amounts of water that otherwise would flow through the facility were likely to cause any meaningful incremental environmental impacts. Even if it were appropriate to apply § 316(b) to these facilities (which NHA and UWAG believe it is not), the exercise of BPJ for existing facilities requires at least some understanding of the location, design, construction, and capacity of the "intake structures" involved and the environmental impacts occurring. Region 10 put the cart before the horse, imposing new "BTA" requirements without first evaluating the attributes of the facilities in question and determining whether or not they already have minimized adverse environmental impacts.

Region 10 also failed to identify the technologies, measures, procedures, and methods that it anticipates facilities would use to meet the requirements imposed by the permit. Nor did

[46] EPA Region 10, Biological Evaluation of the NPDES General Permit for Hydroelectric Facilities Within the State of Idaho, Permit Number IDG360000, at 8 (Feb. 2018).

Region 10 consider how the BTA requirements it seeks to impose may overlap or conflict with FERC license conditions. As discussed below, many of the proposed requirements dictate an outcome (like returning fish to the waterbody or managing tailrace operations to prevent fish access to draft tube areas) without any discussion of what technology or other measures the Region expects the facility to use to accomplish that outcome. The record is equally devoid of any assessment of the feasibility and costs of using whatever technologies, procedures, or methods might be needed to satisfy those requirements, or the level of performance or environmental benefits likely to be achieved. Indeed, some of the measures Region 10 has proposed could be read to apply to hydroelectric facilities as a whole, including parts of the facility (e.g. tailrace) that are not part of the process for diverting cooling water.

The availability and cost of specific technologies and measures, the impact of those costs on affected facilities, and the environmental benefits of requirements based on those technologies are all important factors that EPA acknowledged it needed to consider before establishing its nationally applicable § 316(b) regulations for facilities withdrawing cooling water above the applicable thresholds. EPA also considered feasibility, cost, and benefits in establishing permit application requirements, including those dealing with biological monitoring and other data collection and analysis, reporting, and recordkeeping. Based on its consideration of those factors, EPA was unable to justify imposing any specific BTA technology requirements on facilities below the applicable flow threshold or any uniform application requirements for entrainment for facilities with "actual intake flows"[47] at or below 125 MGD. Yet Region 10

[47] Actual Intake Flow ("AIF") "means the average volume of water withdrawn on an annual basis by the cooling water intake structures over the past three years. After October 14, 2019, Actual Intake Flow means the average volume of water withdrawn on an annual basis by the cooling water intake structures over the previous five years. Actual intake flow is measured at a location within the cooling water intake structure that the Director deems appropriate. The calculation of actual intake flow includes days of zero flow. AIF does not include flows associated with emergency and fire suppression capacity." 40 C.F.R. § 125.92(a).

proposes to impose a host of new § 316(b) requirements without identifying the technologies on which they are based, determining that they are in fact available for the facilities in question, and evaluating their costs and benefits. In particular, the Region failed to consider the important social costs (*e.g.* energy reliability, renewable electricity generation) of imposing new requirements.

In fact, it would be very difficult for many hydroelectric facilities to comply with the requirements outlined in the Proposed Permit. In some cases (*e.g.*, weekly monitoring, returning impinged fish to source water), the requirements Region 10 has proposed are far more onerous than those EPA concluded should apply only to facilities with design flows greater than 2 MGD and actual intake flows greater than 125 MGD. Moreover, even if some facilities could meet some of those requirements, the costs likely would far exceed any plausible environmental benefits.

UWAG and NHA provide the following specific comments on the Proposed Permit's BTA requirements:

- The 2014 Rule establishes requirements for existing facilities that: (1) have NPDES permits, (2) use one or more CWISs with a cumulative DIF of greater than 2 MGD to withdraw water from waters of the U.S., **and** (3) use 25 percent or more of the water withdrawn (on an actual intake flow basis) exclusively for cooling water purposes. 40 C.F.R. § 125.91(a). Facilities with CWISs that are subject to CWA § 316(b) that do not meet these criteria must meet § 316(b) requirements established by the permit writer on a case-by-case, BPJ basis. *Id.* § 125.90(b). The Fact Sheet and Section 401 Water Quality Certification state that the Proposed Permit would cover facilities that fall below the threshold of "2 MGD or less **and** less than twenty-five percent used exclusively for cooling . . . ." Proposed Permit Fact Sheet at 28 (emphasis added); *see also* Section 401 Water Quality Certification at 1. The Proposed Permit, however, states that facilities are ineligible for coverage and must apply for an individual NPDES permit if the facility "uses or proposes to use one or more [CWISs] with a [DIF] of greater than 2 [MGD] **or** the facility uses 25 percent or more of the water it withdraws for cooling water purposes on an average monthly basis." Proposed Permit at 8 (emphasis added). Although, as explained throughout these comments, NHA and UWAG do not believe CWA § 316(b) or the 2014 Rule are applicable to hydroelectric facilities even on a case-by-case BPJ basis, if Region 10 plans to rely on the 2014 Rule, it must be consistent throughout the

Proposed Permit and supporting documents, and clarify that facilities that are ineligible for coverage under the Proposed Permit are those facilities that use greater than 2 MGD **and** use 25 percent or more of the water for cooling purposes.

- 2(a): The Proposed Permit would require permittees to "manage the intake operations to minimize injury to resident fish and other aquatic species in the river," but the Region provides no analysis of the range of existing hydroelectric cooling water intake operations and how their operations could be managed to minimize injury to resident fish and other aquatic species.

- 2(b): The Proposed Permit would require facilities to "manage tailrace operations to prevent fish access to the draft tube areas to minimize injury of fish and other aquatic species." The tailrace and draft tube, however, are not subject to EPA's NPDES permitting authority. Moreover, the cooling water piping may not exist in the draft tube, but rather at the downstream face of the power plant, making managing the tailrace operations at the draft tube ineffective for protecting fish. Because of the geometry and physics of this system, the potential for fish impingement and entrainment is very low, and monitoring for fish is nearly impossible. To the extent that fish access to the tailrace and associated injury from contact with turbine runners constituted a significant resource issue, the existing FERC licensing process would be adequate to fully address the impacts in consultation with fish and wildlife agencies.

- 2(c): The Proposed Permit would require permittees to "cease or reduce the intake of cooling water whenever withdrawal of source water is not necessary," but the Region provides no analysis of, or evidence for, the feasibility or efficacy of ceasing or reducing the intake of cooling water at these hydroelectric facilities.

- 2(d): The Proposed Permit would require permittees to "return all observed live impinged fish to the source water to the extent practicable." The Region provides no analysis that impingement occurs, or can even be discerned, at all types of cooling water intakes or that screening fish and returning fish to the source water is technically feasible.

- 2(e): The Proposed Permit directs permittees not to spray impinged fish or invertebrates with chlorinated water. EPA provides no analysis of, or evidence for, the feasibility or efficacy of restricting the use of chlorinated water at hydroelectric cooling water intakes for minimizing adverse effects of impingement and entrainment.

- 2(f): The Proposed Permit would require permittees to "design an impingement and entrainment monitoring program," and the monitoring is to be conducted "at least weekly." However, as explained above, conducting impingement or entrainment sampling at the pipe or structure taking in cooling water would be very difficult, and even unsafe. Moreover, in the FERC licensing process, study and monitoring needs are determined in consultation with federal and state fish and wildlife agencies. The FERC process is robust and sufficient for determining whether monitoring may be justified and is technically feasible for evaluating fish impingement and entrainment at the cooling water intake.

- 2(g): The permittee is directed to retain the results of this monitoring program on site "for inspection and for submission to EPA as required in Part 4(l) of this Section," but the reference to 4(l) is confusing, given this section (*i.e.*, IV.C) contains no Part 4(l).

- 2(h): The Proposed Permit would require permittees to maintain physical screening or exclusion technology consistent with the guidelines of NMFS Northwest Region's Anadromous Salmonid Passage Facility Design. These guidelines, however, are designed based on physical screening and exclusion technology for the hydroelectric turbines and the bypass operations and are not likely to be feasible at many of the cooling water intakes. Region 10 could not require such technologies for the turbines themselves, which are outside the scope of EPA's NPDES authority.

- 2(i): The Proposed Permit would require the permittee to "operate and maintain the CWIS including any existing technologies used to minimize impingement and entrainment," but it is not clear what technologies could be used at hydroelectric facilities to minimize impingement and entrainment. The Region provides no analysis or explanation.

The information report required under the Proposed Permit's section IV.C.3 has requirements that are excessive and, in some instances, inconsistent with the section IV.C.2 BTA requirements. UWAG and NHA provide the following specific comments on the Proposed Permit's CWIS report requirement:

- 3(d): Reporting requirement 3(d) refers to measures to be taken to maintain a daily maximum surface withdrawal of 1.0 MGD, but such measures are not listed among the BTA requirements.

- 3(e): EPA requests maximum monthly average intake data during the previous five years, but these data may not be collected at hydroelectric cooling water intakes because the intake volume is so small.

- 3(f): Reporting requirement 3(f) refers to whether the facility withdraws cooling water at a rate commensurate with a closed-cycle cooling system without any analysis or explanation as to how this might be relevant to the operation of small cooling water intakes at hydroelectric facilities.

- 3(o): Reporting requirement 3(o) for a report of the five-year results from the impingement and monitoring program called for in Part 2(f) is not supported by any analysis of the need for, technical feasibility, or costs of conducting such a monitoring program. Again, monitoring would not be technically feasible at many facilities, and EPA has not identified how the monitoring information would be applied to future BTA determinations.

VII. EPA Should Clarify Certain Other Requirements in the Proposed General Permit.

In addition to the § 316(b)-related measures addressed above, there are a number of discharge-related provisions in the Proposed Permit that require clarification and/or revision, including the following:

- Eligibility for Permit Coverage: On page 8, the Proposed Permit states that a facility is ineligible for coverage if "[t]he facility is new or has expanded since July 1, 2011." The Fact Sheet states, however, that facilities are not covered by the Proposed Permit if they "are new or have expanded *their discharge* since July 1, 2011." Fact Sheet at 19 (emphasis added). EPA should clarify whether a facility is excluded if it has expanded since July 1, 2011, or whether it is excluded only if the discharge has expanded since July 1, 2011. Similarly, the Proposed Permit states that a facility would be ineligible when "[a] Water Quality Management Plan or Total Maximum Daily Load (TMDL) containing requirements applicable to such a point source is approved," Proposed Permit at 8, but the Fact Sheet states that this applies to facilities "with wasteload allocations from a TMDL for pH, oil, and grease and/or temperature" would be ineligible. Fact Sheet at 19. EPA should clarify whether a facility is ineligible if it has a wasteload allocation as a result of a TMDL for some, but not all of the discharges, or whether a facility could be eligible for only those discharges that do not already have an approved wasteload allocation.

- Existing Measures to Prevent Release of Oil and Grease: In accordance with their FERC license and related requirements, most hydropower producing facilities in the state of Idaho are currently required to maintain procedures in place pursuant to a Spill Prevention Control and Countermeasure (SPCC) and Emergency Action Plan (EAP). Each of these plans is in place in order to protect against any accidental release of oil and grease into a water of the United States. It is unclear, therefore, what additional benefit would derive from the Proposed Permit's Best Management Practices (BMP) Plan requirement.

- BMP Plan Notification: Under the Proposed Permit's "Schedule of Submissions," the permittee must provide EPA with written notification that the BMP Plan has been implemented within 180 days after the effective date of the permit. Proposed Permit at 2. This schedule also indicates that the permittee must notify EPA that the BMP Plan has been implemented within 90 days after authorization to discharge under the General Permit. *Id.* Can EPA guarantee that the permittee will have authorization to discharge within 90 days of the effective date of the permit to allow the permittee to satisfy these obligations on time? Moreover, the 180-day period specified on page 2 of the Proposed Permit is inconsistent with the requirement on page 20 that the permittee submit written notice to EPA and IDEQ that the BMP Plan has been developed and implemented within 90 days of the effective date of the permit. EPA should correct page 20 to use the 180-day period previously specified.

- BTA Notification: Likewise, pursuant to section IV.C.2, facilities withdrawing cooling water must implement BTA within 180 days of the effective date of the permit. Proposed

Permit at 20. Can EPA guarantee that the permittee will have authorization to discharge within enough time to implement BTA within 180 days of the permit's effective date?

- BMP Plan Shield: Part IV.B.5 of the proposed permit would require the permittee to implement BMPs or other measures that "ensure" compliance with a host of vaguely or inconsistently stated objectives. For example, Section IV.B.5(a) would require BMPs to "ensure" that oil, grease, and hydraulic fluids from "all sources" "do not enter the river," apparently in any amount, and regardless whether this would be feasible or necessary to meet water quality standards. Proposed Permit at 21. Yet, section IV.B.5(c) would require only BMPs that "*minimize* the leaking of hydraulic oil or other oils." *Id.* (emphasis added.) As another example, section IV.B.5(d) would require the permittee to "reduce" its reliance on lubricants that come into contact with river water, and sections IV.B.5(e) and IV.B.5(j) would require a "preference" for "environmentally acceptable lubricants" and PCB-free lubricants, paint, and caulk, but no criteria are specified in the permit for evaluating what reductions are required or for exercising these preferences. *Id.* at 21-22. Requirements such as these leave permittees unfairly exposed to agency enforcement actions and citizen suits even when the permittees have complied with them in good faith. To prevent this, the requirements should be stated more clearly and objectively, and the permit should include a provision that a permittee's compliance with the BMPs specified in its required BMP Plan constitutes compliance with section IV.B of the permit. Such a "plan shield" would be consistent with NPDES permit requirements because section IV.B.3(c) authorizes EPA to require changes in the BMP Plan "at any time" if EPA determines that the BMP Plan does not meet the minimum requirements of section IV. But allowing a permittee to rely on the BMPs in its BMP Plan unless and until EPA directs changes in those BMPs would prevent the permittee from being unfairly subject to an enforcement action based on second-guessing the adequacy of the BMPs that it has selected in good faith to comply with the permit's vaguely worded BMP requirements.

- NOI Requirements for Facilities Discharging to § 303(d) Listed Waters: According to the Proposed Permit, facilities that would like coverage under the general permit must submit their initial application or Notice of Intent ("NOI") within 90 days after the effective date of the permit. Proposed Permit at 2. On page 12, item 15, however, applicants discharging to waters listed on IDEQ's most recent CWA § 303(d) list for temperature must submit one complete season (May 1 through November 1) of continuous temperature monitoring data with a copy of their NOI. Facilities that discharge to § 303(d) listed waters for temperature will likely not be able to submit an NOI with one complete season of continuous temperature monitoring data within 90 days after the effective date of the permit. It would make more sense for facilities to begin this sampling once the permit becomes effective. EPA should clarify that such facilities can submit this sampling information after the sampling period has concluded or when the permit is renewed. If this requirement is not adjusted, several facilities in Idaho that would otherwise qualify for coverage under the Proposed Permit would not be eligible. In addition, there is a lack of detail in the Proposed Permit and the Section 401 Water Quality Certification regarding where the monitoring should occur and the sampling intervals. EPA should provide more information on these requirements.

- Effluent Limits Apply Only to Pollutants Added by the Facility: Sections III.A.1-6 of the Proposed Permit would prohibit the "discharge" of various materials that would impair beneficial uses or cause other adverse effects in the receiving water. Proposed Permit at 14. In addition, sections III.A.8-12, Tables 1-5, set forth numeric limits that would apply to the facility's "effluent." *Id.* at 14-17. Consistent with EPA's longstanding position, the Proposed Permit should be revised to clarify that these prohibitions apply only to pollutants that are *added* to receiving waters by the facility, and not to pollutants that are *passed through* the facility from upstream waters, including pollutants contained in facility reservoirs.

- Sampling Frequency: The Proposed Permit delineates four types of discharges that must be sampled, some on a monthly basis. Proposed Permit at 15-17. Monthly sampling is not needed, and there are limited benefits, if any, associated with the extensive sampling scheme proposed. Indeed, the 2009 Region 1 general permit for hydroelectric facilities requires less frequent sampling for similar discharges. For example, whereas the Proposed Permit requires sampling for flow, pH, and oil and grease for cooling water once per month, the Region 1 permit requires sampling once per quarter.[48]

  EPA Region 1 initially proposed monthly sampling, but UWAG and NHA noted in their 2004 joint comments[49] on the Region 1 proposal that monthly sampling is not needed and that there are limited benefits, if any, associated with the extensive sampling scheme Region 1 proposed. UWAG and NHA explained that many of the activities proposed to be regulated under the general permit are periodic in nature and may occur only once or twice a year and, therefore, monthly monitoring would be wasteful. *Id.* at 9. We also noted that obtaining monthly samples could present a substantial logistical challenge to owners and operators due to extreme weather conditions, sample holding time, and lab accessibility. Data that NHA and UWAG member organizations acquired during the FERC licensing process show that the sample results would be well below the discharge limitations that were proposed by Region 1. Region 1 recognized these concerns and, in the final 2009 Region 1 permit, EPA reduced the sampling frequency. In its Response to Comments on the Region 1 permit, EPA stated that it "determined a less frequent monitoring frequency will still provide adequate pollutant monitoring data...."[50]

  Region 10 has provided no principled basis for requiring sampling more frequently than Region 1 determined was sufficient in the 2009 Region 1 general permit. We recommend that Region 10 reduce the sampling frequencies to, at the very least, align with the sampling frequencies that Region 1 determined to be reasonable in the 2009 Region 1 general permit.

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[48] *See* EPA Region 1 General Permits Under the NPDES for Hydroelectric Generating Facilities, Permit Nos. MAG360000 and NHG360000, at 3-4, 6 (Nov. 10, 2009) ("Region 1 Permit").

[49] Joint Comments of NHA and UWAG on the Draft NPDES General Permits MAG360000 and NHG360000 for Hydroelectric Generating Facilities, at 9-10 (Jan. 16, 2004).

[50] EPA Region 1 General Permit Response to Comments NPDES General Permit Nos. MAG360000 and NHG360000, at 42. ("Region 1 Response to Comments").

- Flood/High Water Discharges: The Proposed Permit would impose effluent limitations and monitoring for maintenance-related water during flood/high water events and for equipment-related backwash strainer water. Proposed Permit at 16. In the Region 1 permit, however, EPA recognized that "sampling discharges from emergency flood devices can be dangerous and impracticable," and determined that the monitoring and reporting requirements it had proposed for the flood water discharges were "inappropriate." *See* Region 1 Response to Comments at 19. As a result, the Region 1 permit required only limited monitoring and reporting for facility maintenance-related water during flood/high water events and did not require monitoring for equipment-related backwash strainer water. Region 1 Permit at 6. Region 10 should make similar adjustments to the Proposed Permit.

- Monitoring Adjustment Opportunity: The Region 1 Permit allows for the permittee to request a reduction in the monitoring frequency of any pollutant after 10 valid pollutant samples for the outfall indicate compliance with the pertinent permit limits or demonstrate no reasonable potential to cause or contribute to water quality standards violation. Region 1 Permit at 23. We recommend that EPA revise the Proposed Permit to include the same adjustment opportunity.

- BMP Incident: Under section IV.B.6, facilities must prepare a written report to EPA and IDEQ within seven days after a "BMP incident" has been addressed. However, this term is not defined in the permit. Proposed Permit at 22. EPA should define "BMP incident."

- Toxic Substances v. Toxic Pollutants: Pursuant to section III.A.2, the permittee must not discharge "toxic substances" in concentrations that impair the designated beneficial uses of the receiving water. Proposed Permit at 14. Also, section V.I addresses "Changes in Discharge of Toxic Substances." *Id.* at 29. EPA should clarify whether "toxic substances" are equivalent to "toxic pollutants" as defined in 40 C.F.R. § 122.2.

- "Deleterious Materials": Similarly, section III.A.3, Proposed Permit at 14, and section V.G.5, *id.* at 29, refer to "deleterious materials," but these materials are not defined. These terms should also be defined.

- Total Suspended Solids (TSS) Levels: The Proposed Permit requires a monitoring method that will achieve a maximum Minimum Level for TSS of 5 mg/L. But there is no monitoring requirement for TSS, and EPA acknowledges that TSS is naturally occurring. Proposed Permit at 17, 45. EPA must explain the basis for such a requirement. In the Region 1 general permit for hydroelectric facilities, for example, this issue was resolved by removing the requirement to monitor TSS.

- "Maximum Minimum Level": The table in Appendix A lists the "maximum Minimum Level (ML)" for pollutants in the permit. Proposed Permit at 45. EPA must clarify how facilities should apply this standard.

- "Significant": Appendix C uses the term "significant" in multiple places to describe what must be included in the BMP Plan, but the term "significant" is not defined in the

Proposed Permit. EPA should clarify the factors that will be used to determine when a spill, event, or some other occurrence is "significant."

VIII. Conclusion

In sum, EPA Region 10 should not apply CWA § 316(b) to hydropower facilities. Section 316(b) was intended by Congress to address CWIS at steam electric and similar facilities, not hydropower projects. Furthermore, EPA CWIS regulations do not call for application of § 316(b) to hydropower facilities, and those regulations were not developed with any consideration of doing so, making it highly inappropriate for Region 10 to seek to impose the regulations or elements of them on the facilities. As noted above, the FPA and CWA § 401 fully protect both water quality and fish and wildlife in the context of hydropower facilities. Therefore, Region 10 should remove any § 316(b)-related provisions from the Proposed Permit.

UWAG and NHA appreciate the opportunity to comment on the Proposed Permit and provide factual information regarding operation of our members' hydroelectric facilities. No commenter, however, can make up for the lack of a comprehensive administrative record in the first instance that provides the Agency's evaluation of the availability and feasibility of potential technologies for hydroelectric facilities. We hope that EPA will pursue our recommendations and we look forward to working with you to address these meaningful issues.

Message

From: Mann, Rachel [rkmann@hunton.com]
Sent: 10/19/2018 7:26:17 PM
To: Papadopoulos, George [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5def9d742e6e4bbbbeebf45f13686989-Papadopoulos, George]
CC: McGrath, Kerry L. [KMcGrath@hunton.com]; jennifer.wood@state.ma.us [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7e3db25c521446edb472841f8a0236b2-jennifer.wo]; stergios.spanos@des.nh.gov [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bc76eb84e66943c1961b16d9abf7575f-stergios.spanos@des.nh.gov]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: RE: UWAG Comments on EPA Region 1 General Permit for MA and NH Hydroelectric Facilities
Attachments: UWAG Comments on EPA R1 General Permit for MA and NH Hydros 10-19-18_70931736_14-c.PDF

The full comments are attached. (I inadvertently send the wrong document.) I apologize. Thank you for your patience.

From: Mann, Rachel
Sent: Friday, October 19, 2018 3:13 PM
To: 'papadopoulos.george@epa.gov'
Cc: McGrath, Kerry L.; 'Jennifer.Wood@state.ma.us'; 'Stergios.spanos@des.nh.gov'; 'Ross.davidp@epa.gov'; 'Forsgren.lee@epa.gov'; 'Wildeman.anna@epa.gov'; 'Sawyers.andrew@epa.gov'; 'McDonough.owen@epa.gov'
Subject: UWAG Comments on EPA Region 1 General Permit for MA and NH Hydroelectric Facilities

Please see the attached comments of the Utility Water Act Group on the Region 1 proposed NPDES general permit for hydroelectric facilities in Massachusetts and New Hampshire.

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UWAG
Utility Water Act Group

October 19, 2018

Via Email

U.S. EPA Region 1
Office of Ecosystem Protection
Attn: George Papadopoulos
5 Post Office Square, Suite 100
Mail Code OEP–06–1
Boston, MA 02109-3912
papadopoulos.george@epa.gov

Re: Comments of the Utility Water Act Group on the EPA Region 1 Proposed NPDES General Permit for Hydroelectric Generating Facilities in Massachusetts (MAG360000) and New Hampshire (NHG360000)

Dear Mr. Papadopoulos:

The Utility Water Act Group respectfully submits the following comments on the EPA Region 1 Proposed NPDES General Permit for Hydroelectric Facilities in the Commonwealth of Massachusetts (MAG360000) and the State of New Hampshire (NHG36000), 83 Fed. Reg. 42,118 (Aug. 20, 2018). We appreciate the opportunity to provide comments on the proposal, which we believe raises significant issues for hydropower project operators in the region and beyond.

If you have any questions about these comments or wish to discuss the issues further, please contact Kerry McGrath at (202) 955-1519 or kmcgrath@HuntonAK.com

We appreciate your attention to this important matter.

Sincerely,

Kerry L. McGrath
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2200 Pennsylvania Avenue, NW
Washington, DC 20037
Counsel for the Utility Water Act Group

cc: Jennifer Wood, Massachusetts Department of Environmental Protection (Jennifer.Wood@state.ma.us)
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The Utility Water Act Group Comments on EPA Region 1 Proposed NPDES General Permit for Hydroelectric Facilities in the Commonwealth of Massachusetts and the State of New Hampshire

83 Fed. Reg. 42,118 (Aug. 20, 2018)

October 19, 2018

Executive Summary

With the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 1's proposed National Pollutant Discharge Elimination System ("NPDES") general permit for hydroelectric facilities discharging to waters within the Commonwealth of Massachusetts (MAG360000) and the State of New Hampshire (NHG360000) ("Proposed Permit"), 83 Fed. Reg. 18,555 (Apr. 27, 2018), EPA takes the position that hydroelectric facilities are subject to the requirements of Clean Water Act ("CWA") § 316(b), 33 U.S.C. § 1326(b), and EPA's 2014 Final Rule to Establish Requirements for Cooling Water Intake Structures ("CWISs") at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014) ("2014 Rule" or "Existing Facilities Rule"). While this is a change from the previous Region 1 Hydro General Permit, which did not include CWA § 316(b) requirements, Region 1's proposal continues a disturbing recent trend that could have significant implications for the nation's approximately 2100 hydroelectric facilities.

EPA first indicated its intent to apply CWA § 316(b) requirements to hydroelectric facilities in Region 10's Proposed NPDES General Permit for Hydroelectric Facilities within the State of Idaho (IDG360000). 83 Fed. Reg. 18,555 (Apr. 27, 2018). We understand that EPA Headquarters has directed certain states to do the same in their NPDES permitting. As we detailed in UWAG and the National Hydropower Association's joint comments on the Region 10 proposal,[1] EPA is wrong to apply CWA § 316(b) and the 2014 Rule to hydroelectric facilities, which do not have CWISs in the conventional industrial context upon which the current § 316(b) regulations and requirements were developed.

[1] Comments of the National Hydropower Association and the Utility Water Act Group on EPA's Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho (IDG360000) (July 11, 2018), 83 Fed. Reg. 18,555 (Apr. 27, 2018).

Unlike the other facilities to which EPA has applied § 316(b), EPA has not established technology-based limitations and standards for hydroelectric facilities, nor would it be reasonable to do so given the *de minimis* nature of their withdrawals. EPA never collected any information on the design, location, construction, and capacity of pipes or other features used to divert water for use in cooling equipment in hydroelectric facilities, or on the environmental impacts of those features. As these comments will show, that omission is crucial because hydroelectric facilities differ substantially from the largely land-based steam electric plants and industrial facilities for which EPA developed the 2014 Rule and every other § 316(b) rule the Agency has adopted. Of equal significance, EPA has never considered any of the legal, technical, or economic issues involved in applying § 316(b) to hydroelectric facilities.

The Proposed Permit nevertheless relies on the 2014 Rule's standards for steam electric power and manufacturing plants to establish the Region's best professional judgment ("BPJ") about what measures are the best technology available ("BTA") "to minimize [the] adverse environmental effects of [CWIS]" at hydroelectric facilities, and requires that the permittee implement those technologies within 90 days of receiving authorization to discharge under the permit. *See* Proposed Permit § 4.2.

There are several key problems with Region 1's proposal. First, interpreting CWA § 316(b) to apply to hydroelectric generation facilities would be a significant expansion of EPA's regulatory jurisdiction. Second, EPA has never provided notice of, support for, or an opportunity for comment on the applicability of § 316(b) to hydroelectric facilities. As UWAG and NHA noted in our joint comments on the recent Region 10 proposal, the agency's proposal did not provide analysis of or support for application of CWA § 316(b) or the 2014 Rule to hydroelectric facilities. In fact, during the existing facilities rulemaking, the Agency explicitly stated that

withdrawals from hydroelectric facilities were not meant to be addressed in its Existing Facilities Rule. 76 Fed. Reg. 22,174, 22,190 (Apr. 20, 2011). It would be arbitrary and capricious, and contrary to the Administrative Procedure Act ("APA") requirements for fair notice and opportunity for comment, for EPA to now adopt such a novel, post-hoc interpretation.

Third, even if EPA, after full and procedurally appropriate consideration of the issue, concluded that CWA § 316(b) applies to hydroelectric facilities (which UWAG believes it should not), the requirements of the 2014 Rule are not appropriate for such facilities, which are fundamentally different from the steam electric power and manufacturing plants EPA considered in that rulemaking, both in terms of the feasibility and cost of technology and the assessment of environmental impacts. Indeed, the 2014 Rule's requirements would be unnecessary in most cases because the rates of impingement and entrainment would be so low that additional controls would not be warranted. Fourth, establishing § 316(b) requirements for CWISs at hydroelectric facilities would conflict with and duplicate other federal and state processes and requirements already in place, including requirements established through the FERC licensing process. In particular, technology requirements that go beyond the location, design, construction, and capacity of cooling water intake structures, such as Region 1's proposed requirement for fish passage over the dam, go well beyond EPA's limited CWA § 316(b) authority and would intrude on FERC's authority. Entrainment and impingement impacts of the dam itself, if any, are appropriately addressed through FERC licensing, not NPDES permits.

In the Proposed Permit, Region 1 proposes to establish new BTA requirements based on its "best professional judgment" without first evaluating the attributes of the facilities in question and determining whether they have already minimized adverse environmental effects. In fact, it would be very difficult and, in some cases, infeasible, for hydroelectric facilities to comply with

some of the requirements outlined in the Proposed Permit. Even if some facilities in New Hampshire and Massachusetts could comply with some of the proposed measures, the costs of doing so would likely far exceed any plausible environmental benefits. Because the proposed Region 1 general permit is being issued by EPA, if finalized, the permit could be seen as a model for other Regions and States. Therefore the Region 1 proposal has important implications beyond Massachusetts and New Hampshire. For all of these reasons, discussed in more detail in these comments, Region 1 should remove any § 316(b)-related provisions from the Proposed Permit.

Table of Contents

The Utility Water Act Group Comments on
EPA Region 1's NPDES General Permit for Hydroelectric Facilities in
the Commonwealth of Massachusetts and the State of New Hampshire

I. Introduction

EPA Region 1 proposes to issue a NPDES general permit for hydroelectric facilities discharging to waters within the Commonwealth of Massachusetts and the State of New Hampshire. 83 Fed. Reg. 42,118 (Aug. 20, 2018) ("Proposed Permit"). With Region 1's proposal, upon the heels of a similar Region 10 proposal, which has not yet been finalized, EPA again takes the position that hydroelectric facilities are subject to the requirements of CWA § 316(b), 33 U.S.C. § 1326(b), and EPA's 2014 Rule. As detailed in these comments and in joint comments submitted by UWAG and the National Hydropower Association (NHA) in response to the Region 10 proposal,[2] EPA's position is unsupported and contrary to law.

The Proposed Permit would apply only to hydroelectric facilities that require a NPDES permit to discharge pollutants associated with the operation of hydroelectric facilities to waters of the United States in Massachusetts and New Hampshire, and that use water to cool some of that equipment, where the amount of cooling water falls below the 2014 Rule's qualifying thresholds.[3] Region 1 asserts that those hydroelectric facilities must meet CWA § 316(b) requirements established by the Director on a case-by-case, BPJ basis under 40 C.F.R. § 125.90(b). Proposed Permit Fact Sheet at 25. The Proposed Permit purports to reflect the Region's BPJ about what CWIS technology is the best available "to minimize [the] adverse environmental effects of [CWIS]" at hydroelectric facilities and requires that the permit

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[2] *Supra* note 1.

[3] *See* Proposed Permit § 3.3(a). The 2014 Rule's stringent requirements apply only to facilities that are point sources requiring a NPDES permit, withdraw from a water of the United States, use CWIS with a design intake flow of greater than 2 million gallons per day ("MGD"), and use 25 percent or more of the water withdrawn exclusively for cooling purposes. 40 C.F.R. § 125.91(a).

conditions reflecting those technologies be met within 90 days of receiving authorization to discharge under the permit. Proposed Permit § 4.2.

The Region's proposal to apply CWA § 316(b), even on a BPJ case-by-case basis, to hydroelectric facilities is neither compelled by nor consistent with the CWA. And, as demonstrated in these comments, even if CWA § 316(b) were applicable, the Region's proposed BPJ requirements are arbitrary and capricious for several reasons. First, Region 1 seeks to impose requirements that go well beyond EPA's limited authority under CWA § 316(b) to require that the location, design, construction, and capacity of CWISs reflect the best technology for minimizing adverse effects. Second, establishing § 316(b) requirements for CWISs at hydroelectric facilities would conflict with and duplicate other federal and state processes and requirements already in place, including requirements specifically designed to address environmental impacts established through FERC's licensing process and the state CWA § 401 water quality certification process. Third, the Fact Sheet demonstrates that the Region borrowed from and relies on a rule that EPA expressly stated did not apply to hydroelectric facilities and that the Agency adopted without any consideration of the technical feasibility or cost of application of such requirements to hydroelectric facilities. Proposed Permit Fact Sheet at 23-25. Finally, the Region has provided no independent analysis of or support for any of the proposed requirements. Indeed, for the three conditions imposed, neither the Fact Sheet nor the Proposed Permit provides any meaningful discussion of the technical feasibility, costs, benefits, or other relevant factors associated with those conditions.

The Utility Water Act Group ("UWAG") is a voluntary, non-profit, unincorporated group of 147 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the

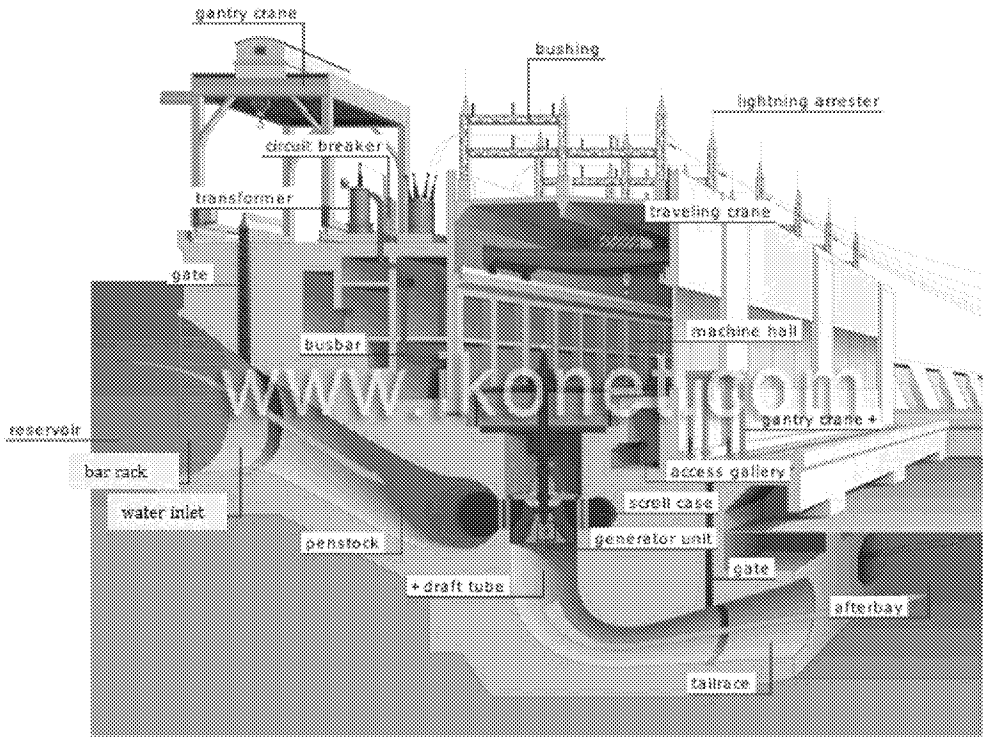
American Public Power Association. UWAG members operate hydroelectric facilities, power plants, and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. One of UWAG's purposes is to participate on behalf of its members in EPA regulatory actions under the CWA and in litigation arising from those regulatory actions. UWAG's membership includes owners and operators of hydroelectric facilities that would be affected by the adoption and issuance of the Proposed Permit.

Within the United States, there are approximately 2,200 hydroelectric facilities, of which private entities own and operate around 1,300 facilities, and public entities own and operate approximately 900 facilities.[4] Hydroelectric facilities vary significantly in terms of design and configuration, especially when it comes to the pipes and structures that divert water for purposes of cooling. Generally, water diverted for cooling is primarily sourced from three locations within the hydroelectric facility: (1) the penstock – a closed conduit or pipe that conveys water from the reservoir to the turbine, (2) the turbine scroll case – a spiral-shaped steel structure that distributes water flow through the wicket gates located just prior to the turbine, or (3) a water inlet port located on the face of the dam. There likely are exceptions to these locations because each facility has a unique, location-specific design to take maximum advantage of the hydraulics of that location. An individual facility may use one design exclusively, or may use a combination of designs. After use for cooling, diverted water is transferred downstream primarily via these methods: (1) directed back to the penstock and re-used to generate electricity, (2) directed back to the scroll case (low head dams mainly) and re-used to generate electricity, (3) directed to the tailrace via the draft tube, or (4) direct transfer to the tailrace. The

[4] *See* U.S. Department of Energy, 2014 Hydropower Market Report, Figure 5, at 13 (Apr. 2015).

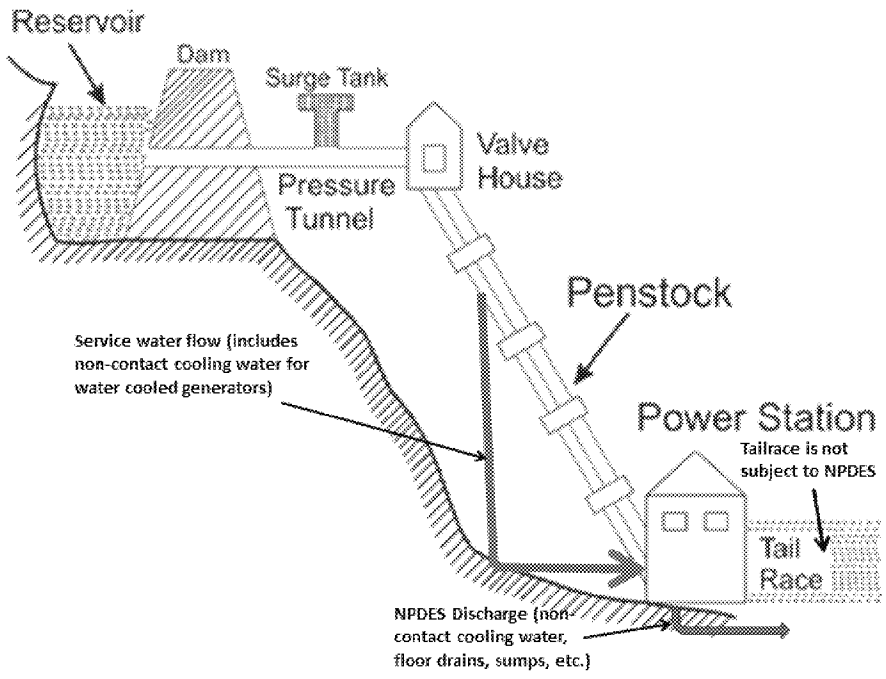
features of a typical hydroelectric facility are depicted in Figure 1, and an example of a facility diverting cooling water from the penstock is depicted in Figure 2.

Figure 1[5]



[5] The Visual Dictionary, Cross Section of a Hydroelectric Plant, www.ikonet.com.

Figure 2



Accordingly, hydroelectric generating facilities do not have CWISs in the conventional industrial context upon which the current § 316(b) regulations were developed. Hydroelectric facilities bring a wide variety of technical challenges associated with characterizing impingement and entrainment, and applying technologies that EPA considered in its 2014 rulemaking as available for on-shore facilities. This is evident in the 2014 Rule's definition of a CWIS. EPA's regulations define CWIS as "the total physical structure and any associated construction waterways used to withdraw cooling water from waters of the United States. The [CWIS] extends from the point at which water is first withdrawn from waters of the United States up to, and including the intake pumps." 40 C.F.R. § 125.92(f). The 2014 Rule envisions the use of pumps to actively *withdraw* cooling water from surface waters that are waters of the U.S., but this broad definition is inappropriate for hydroelectric facilities, which are diversion structures by design – impounding water and transporting/passing water along a contiguous waterway to

turn turbines used to generate electricity.[6] Relative to the total water transported through the facility, a very small amount of water is diverted for cooling. In general, cooling water accounts for less than 1 percent of the total water transported through the facility, and in some cases less than 0.1 percent. For example, at the Keowee Hydro Station, the cooling water is generally less than 0.01 percent of the total discharge flow.[7] As explained in further detail herein, given the wide range of configurations for hydroelectric facilities and different processes for diverting water for cooling, the best available technologies and sampling requirements imposed by EPA for steam electric power plants and manufacturing plants are not necessarily appropriate or practical for hydroelectric facilities. The Region 1 Proposed Permit fails to consider or account for these challenges.

II. EPA's Interpretation and Implementation of § 316(b) to Date

A. EPA's Prior Regulations Implementing § 316(b) Have Not Addressed Hydroelectric Facilities.

Section 316(b) provides:

> Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

33 U.S.C. § 1326(b).

EPA has implemented this provision by issuing regulations that establish BTA standards for intake structures that become binding for a particular facility only after the standards are incorporated into a NPDES permit for discharges from a regulated facility. At no point during

[6] Hydroelectric facilities do not have conventional CWIS, and their configurations vary. These comments refer to the mechanisms that divert cooling water as intakes, pipes, or diversion structures.

[7] South Carolina NPDES Permit No. SC0000515, Fact Sheet and Permit Rationale at 18 (Mar. 16, 2011).

EPA's long history of implementing § 316(b) have EPA's regulatory actions addressed or evaluated the applicability of CWA § 316(b) to hydroelectric facilities.[8]

In 1976, EPA issued its first § 316(b) rule, 41 Fed. Reg. 17,387 (Apr. 26, 1976), but the Fourth Circuit remanded it to EPA on procedural grounds. *Appalachian Power Co. v. Train*, 566 F.2d 451 (4th Cir. 1977). EPA's remaining rule and guidance instructed NPDES permit writers to make case-by-case determinations regarding BTA for CWIS at point sources subject to EPA standards established pursuant to §§ 301 or 306. *See* 40 C.F.R. § 401.14 ("The location, design, construction and capacity of cooling water intake structures of any point source for which a standard is established pursuant to section 301 or 306 of the Act shall reflect the best technology available for minimizing adverse environmental impact, in accordance with the provisions of part 402 of this chapter."); 33 U.S.C. § 1342(a)(1)(B).[9] By its terms, § 401.14 applies only to those point sources for which technology-based standards are established under §§ 301 and 306. By contrast, even where hydroelectric facilities require NPDES permits for discharges, the limits imposed are largely water quality-based.[10] Although § 401.14 has been in effect since 1976, generally, neither federal nor state NPDES permitting authorities read § 401.14 as applicable to hydroelectric facilities that are issued NPDES permits for minor equipment-related discharges.[11]

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[8] Courts agree that NPDES permitting applies only to minor operations-related discharges of pollutants from hydroelectric facilities and not the overall use of water by hydroelectric projects to generate electricity. *See National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

[9] *See also* EPA, *Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) Public Law 92–500*, at 4 (1977) ("The environment-intake interactions in question are highly site-specific and the decision as to best technology available for intake design, location, construction, and capacity must be made on a case-by-case basis.").

[10] *See, e.g.*, Arkansas NPDES Permit No. AR0048755, Statement of Basis at 6-7 (Apr. 13, 2017); Arkansas NPDES Permit No. AR0048763, Statement of Basis at 7 (Sept. 4, 2013); West Virginia NPDES Permit No. WV0078859, App. A § I.12 (Aug. 9, 2016); South Carolina Department of Health and Environmental Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015).

[11] *See, e.g.*, NPDES General Permit for Hydroelectric Facilities in the States of Massachusetts and New Hampshire, Permit Nos. MAG360000, NHG360000 (Nov. 10, 2009); ADEM General Permit Rationale, Hydroelectric Facilities ALG360000 (Aug. 18, 2015); South Carolina Department of Health and Environmental

Since 1976, EPA has issued a series of regulations implementing § 316(b) for new facilities, as well as existing steam electric plants and manufacturing facilities. The Phase I rule established national technology-based performance requirements for new facilities that withdraw greater than 2 MGD of surface water and use at least 25 percent of the water they withdraw for cooling purposes. 66 Fed. Reg. at 65,255 (Dec. 18, 2001). The Phase II rule set requirements for existing steam electric plants with flows greater than 50 MGD, 69 Fed. Reg. 41,576 (July 9, 2004), but certain aspects of the rule were invalidated by the U.S. Court of Appeals for the Second Circuit and later withdrawn.[12] The rules for lower flow steam electric plants and all manufacturing facilities (known as the Phase III rules) were also withdrawn. 71 Fed. Reg. 35,006 (June 16, 2006). In place of the Phase II and III rules, in 2014, EPA issued a single rule for existing facilities – the 2014 Existing Facilities Rule.[13]

During the development of the Phase I, II, and III rules, EPA never suggested that any of those rules would apply to hydroelectric facilities, whether or not the facilities use cooling water or need a NPDES permit. None of EPA's Information Collection Requests ("ICRs") were directed at hydroelectric facilities, nor did EPA use any other method to collect or consider information on cooling water diversion or use by hydroelectric facilities. Variations in the locations, design, and configurations of cooling water "intakes" unique to hydroelectric facilities were never contemplated in EPA's previous facility surveys or technology evaluations for promulgating § 316(b) regulations for new or existing power generating facilities. EPA did not consider whether hydroelectric facilities could feasibly monitor or otherwise assess entrainment

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Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015); North Carolina Department of Environment and Natural Resources, NPDES General Permit No. NCG50000 (Oct. 1, 2015). We are aware of one exception, discussed in note 38, infra.

[12] *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007); 72 Fed. Reg. 37,107 (July 9, 2007).

[13] Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014).

or impingement mortality associated with cooling water diversion or whether those facilities could distinguish such mortality from mortality occurring by virtue of the passage of water through the turbines. Nor did EPA consider the availability, performance, or cost of technologies for reducing entrainment or impingement mortality that might be caused by hydroelectric facilities' cooling water "intakes," which often consist of one or more relatively small pipes diverting water from within or coming off of the penstock or draft tube of a hydroelectric facility or in some other location depending upon the broader facility design and operation.

The development of EPA's 2014 § 316(b) Rule was no different; EPA's ICR solicited no information from any hydroelectric facility.[14] As discussed below, EPA stated in the preamble to the proposed rule that water withdrawals for generation of electricity by hydroelectric facilities were not subject to the rule. *See* 76 Fed. Reg. 22,174, 22,190 (Apr. 20, 2011). As a result of this express and unambiguous statement, EPA received no comments regarding the potential applicability of CWA § 316(b) to hydroelectric facilities or addressing the potential impacts of applying the proposed technology requirements to hydroelectric facilities. Indeed, in the final 2014 Existing Facilities Rule, EPA estimated that a total of 1,065 facilities (544 electric generators and 521 manufacturers) would be subject to the Rule. 79 Fed. Reg. at 48,305. None of those facilities were hydroelectric power generators.[15] Thus, EPA never collected the necessary information to evaluate impacts of the Rule on hydroelectric facilities, even though

[14] *See* Information Collection Request (ICR) for CWIS at Existing Facilities (Final Rule), OMB Control No. 2040-0257, EPA ICR No. 2060.07 (Aug. 2014).

[15] 2014 TDD at 4-24 ("From the universe of facilities with a steam electric prime mover and based on data collected from EPA's industry technical questionnaires and the compliance requirements for the final rule, EPA has identified 544 facilities to which the proposed rule is expected to apply.").

some hydropower generators divert more than 2 MGD and use 25 percent or more of the diverted water for cooling purposes.

The 2014 Rule establishes requirements for existing facilities that: (1) have NPDES permits, (2) use one or more CWISs with a cumulative design intake flow ("DIF") of greater than 2 MGD to withdraw water from waters of the U.S., and (3) use 25 percent or more of the water withdrawn (on an actual intake flow basis) exclusively for cooling water purposes. 40 C.F.R. § 125.91(a). Facilities with CWISs that are subject to CWA § 316(b) that do not meet these criteria must meet § 316(b) requirements established by the permit writer on a case-by-case, BPJ basis. 40 C.F.R. § 125.90(b). EPA's final 2014 Existing Facilities Rule made no mention of hydroelectric facilities in the preamble or regulatory text.

B. The Proposed NPDES General Permit Inappropriately Seeks to Apply § 316(b) Requirements to Hydroelectric Facilities.

The Fact Sheet for the Region 1 Proposed Permit asserts EPA's position that CWA § 316(b) and the 2014 § 316(b) Rule apply to hydroelectric facilities. The Fact Sheet states that the proposed general permit would impose § 316(b) requirements "based on a case-by-case, best professional judgment" for facilities which use any portion of the water withdrawn for cooling. Proposed Permit Fact Sheet at 25.

Like the Region 10 proposal, the Region 1 Fact Sheet asserts EPA's position that hydroelectric facilities are subject to § 316(b) requirements. The Fact Sheet expressly states, "CWA § 316(b) applies to hydroelectric facilities that operate an intake structure withdrawing water from a river for cooling purposes, including for cooling bearings or other equipment." Fact Sheet at 24. The Region 1 general permit would not cover facilities that withdraw more than 2 MGD and which use at least 25 percent of the water withdrawn for cooling purposes. "For the purposes of this general permit, the percentage of water used for cooling is calculated as

a percentage of the total volume withdrawn for use in the facility, not as a percentage of the volume of water that passes through the penstock or turbines." *Id.*

The Region 1 proposal's BTA determination differs from the Region 10 proposal's. Under the Region 1 Proposed Permit's BTA requirement, the applicant must implement at least one of the following three measures within 90 days of receiving authorization to discharge under the permit:

- A physical or behavioral barrier must be located at the first intake encountered by fish on the upstream side of dam that directs fish toward a downstream passage that safely conveys fish over the dam (without being exposed to the CWIS);
- If cooling water is withdrawn directly from the penstock, the velocity at the cooling water intake should not exceed 0.5 feet per second ("fps"); or
- If cooling water is withdrawn directly from the source waterbody, the intake must be equipped with a physical screen "of sufficient mesh size to minimize the potential for adult and juvenile fish to become entrained," and the through-screen velocity must not exceed 0.5 fps.

See Proposed Permit § 4.2(a)-(c). Also, as part of the Notice of Intent ("NOI"), the permittee must submit a number of site-specific reports describing intake volume and water withdrawal information:

- The maximum daily intake volume during the previous five years, in gallons per day ("GPD");
- The date on which maximum daily intake occurred;
- The maximum monthly average intake volume during the previous five years;
- The month and year in which the maximum monthly average intake flow occurred;
- The maximum daily and average monthly volume of water withdrawn and used exclusively for cooling;
- The volume in GPD, if any, of withdrawn water that is used for cooling that is then reused at the facility prior to discharge, and if so how it was reused;
- The calculated intake velocity at the cooling water intake structure in fps;

- The volume of water withdrawn for use in the facility as a percentage of: (i) installed capacity of the turbines; (ii) average daily flow through the penstock; and (iii) minimum flow through the penstock;

- The source water's annual mean flow and 7-day mean stream low flow with 10-year recurrence interval ("7Q10") flow if the intake is located on a freshwater river or stream, in cubic feet per second ("cfs") as available from USGS or other source (*e.g.*, MassDEP or NHDES) with indication of whether river flow is managed and the parameters associated with such an arrangement; and

- A characterization of the habitat upstream of the dam, including descriptions of resident and migratory fish species, life history attributes, and stocking information. As an example, the applicant may include any biological characterization of the habitat upstream of the dam completed during FERC licensing or otherwise with the assistance of state or federal agencies.

See Proposed Permit § 4.3. Based on this site-specific information, EPA may impose additional requirements using best professional judgment. *See* Fact Sheet § 4.3.

The Region provides no analysis or support for applying § 316(b) requirements to hydroelectric facilities. The Fact Sheet demonstrates that the Region relied on and drew heavily from EPA's 2014 Rule in establishing CWIS-related requirements in the Proposed Permit. *See* Fact Sheet at 23-25. But nowhere in the Proposed Permit or Fact Sheet does the Region provide any support or independent analysis for the measures it proposes to require for hydroelectric facilities.

III. CWA § 316(b) Does Not Apply to Hydroelectric Facilities.

A. Hydroelectric Generation Facilities Are Not Subject to CWA § 316(b).

By its terms, § 316(b) applies only where EPA establishes standards under §§ 301 and 306 for point sources. Unlike the other facilities to which EPA has applied § 316(b), EPA has not established such technology-based limitations and standards for hydroelectric facilities, nor would it be reasonable to do so given the *de minimis* nature of their cooling water withdrawals and discharges. As the United States Supreme Court has recognized, absent clear direction from Congress, courts will view (and agencies should view) with skepticism statutory interpretations

that extraordinarily expand regulatory jurisdiction. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). Interpreting CWA § 316(b) to apply to hydroelectric generation facilities would be a significant expansion of EPA's regulatory jurisdiction and would duplicate other federal and state requirements specifically designed to address these environmental impacts.

The limited legislative history for § 316(b) indicates that Congress did not intend for § 316(b) to apply to hydroelectric facilities. From November 1971 to October 1972, Congress considered various bills that eventually would become the CWA. On September 28, 1972, the conference committee substantially amended § 316, modifying that provision to insert for the first time a provision addressing cooling water intakes structures, and submitted its report for approval by both the House and Senate.[16] During the House of Representatives consideration of the conference report, Rep. Donald Clausen (R-CA1) made the following statement in support:

> Section 316 was originally included in the House-passed water pollution control bill because of the belief that the arguments which justified a basic technological approach to water quality control did not apply in the same manner to the discharges of heat.... [S]team-electric generating plants are the major source of the discharges of heat.... Section 316(b) requires the location, design, construction, and capacity of cooling water intake structures *of steam-electric generating plants* to reflect the best technology available for minimizing any adverse environmental impact.[17]

Rep. Clausen's statement indicates that Congress intended § 316(b) to apply to steam electric generating plants, not hydroelectric generating facilities that harness the power of falling or fast-moving water to drive turbines to produce electricity.[18] In contrast, steam electric power plants heat water into steam that drives the electric-generating turbines, typically requiring considerably

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[16] *See* H.R. Rep. No. 92-1465, at 68, 137 (Sept. 28, 1972).

[17] House Consideration of the Report of the Conference Committee (Oct. 4, 1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 262–64 (1973) (statement of Rep. Clausen) (emphasis added).

[18] We recognize that some U.S. Courts of Appeals have held that § 316(b) applies to other industrial facilities that use cooling water beyond steam electric plants (*e.g.*, iron and steel). *See, e.g.*, *Appalachian Power Co. v. Train*, 566 F.2d 451, 457-58 (4th Cir. 1977). But those decisions did not consider whether all facilities that must obtain a NPDES permit are subject to § 316(b).

more cooling water to safely operate the facility. It is these facilities that were Congress' focus when it promulgated CWA § 316(b).

In promulgating CWA § 316(b), Congress would have understood, as discussed in more detail below, that other statutes and regulations governed consideration of environmental impacts from water diversion structures. For example, Congress would have been well aware that the Federal Power Act ("FPA") licensing process for hydroelectric facilities requires evaluation of environmental impacts and conditions to protect and mitigate impacts to fish and wildlife-related habitat. Congress gave no indication that it intended such facilities to be subject to additional requirements under CWA § 316(b), nor would such requirements have made sense in light of the other mechanisms in place under the FPA. There is no evidence that Congress intended CWA § 316(b) to apply to hydroelectric facilities, and, indeed, the limited legislative history for that provision indicates that Congress intended § 316(b) to address adverse environmental impacts associated with industrial facilities, such as steam electric generating facilities, for which the statute requires EPA to establish nationally applicable effluent limitations guidelines and new source performance standards. There is no basis in the statute for EPA's new interpretation that § 316(b) can apply to hydroelectric facilities.

B. Establishing § 316(b) Requirements for CWISs at Hydroelectric Facilities Would Conflict with and Duplicate Other Federal and State Requirements Already in Place.

The statutory scheme Congress established under the FPA, and other federal statutes, demonstrates Congress' intent that the Federal Energy Regulatory Commission ("FERC") address, through the FERC hydropower licensing process, all issues relating to the use of water

by non-federal hydroelectric facilities, including any water quality issues raised by a State CWA § 401 certification.[19]

The comprehensive development standard of FPA § 10(a)(1) requires that licensed hydroelectric projects be best adapted to a comprehensive plan for improving or developing a waterway, including, among other uses, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat). 16 U.S.C. § 803(a)(1). Section 10(a)(1) grants FERC the authority to require the modification of any project and of the plans and specifications of the project works before approval. Thus, to the extent that participating resource agencies, which are actively involved in the licensing process, identify during licensing significant issues relating to impacts from diversion and use of cooling water at hydroelectric facilities, those impacts would be considered by FERC in ensuring that the project will be best adapted to a comprehensive plan.

Section 10(j) of the FPA provides for the full participation of federal and state fish and wildlife agencies in recommending conditions for the protection, mitigation, and enhancement of fish and wildlife resources affected by the development, operation, and management of the hydroelectric project.[20] Such conditions are based on recommendations received pursuant to the Fish and Wildlife Coordination Act from the National Marine Fisheries Service ("NMFS"), the U.S. Fish and Wildlife Service ("FWS"), and state fish and wildlife agencies. As part of the

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[19] This section focuses on hydroelectric projects that require FERC authorization because those are the most common facilities for our members. Certain non-federal hydroelectric facilities, such as small projects (5 MW or less) or projects conducted on an existing conduit (*e.g.*, irrigation canal), do not require FERC licensing because those projects would result in minor environmental effects (*e.g.*, projects that involve little change to water flow and use and are unlikely to affect threatened and endangered species), but they are still subject to a similar process and subject to mandatory terms and conditions set by federal and state fish and wildlife agencies and by the Commission. 18 C.F.R. § 4.30. Other federal, non-FERC regulated hydroelectric facilities are generally authorized by Congress and owned by the U.S. Bureau of Reclamation or the U.S. Army Corps of Engineers and in some circumstances must comply with National Environmental Policy Act provisions regarding impacts to aquatic resources associated with operational changes, as well as formally consult with the U.S. Fish and Wildlife Service where federally threatened and endangered species are potentially impacted.

[20] 16 U.S.C. § 803(j)(1).

application for a hydroelectric license (or relicense), applicants must submit an environmental report to FERC describing the fish and wildlife that occur within the vicinity of the project and downstream areas affected by the project, and must identify any federally-listed threatened or endangered species.[21] The same report also must describe any measures recommended by consulting fish and wildlife agencies for mitigating such impacts and protecting fish and wildlife.[22]

Additional requirements to evaluate potential impacts to aquatic species exist under the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"). Pursuant to ESA § 7 and FERC's corresponding regulations, FERC has an obligation to ensure that any project it authorizes is not likely to jeopardize the continued existence of any federally listed endangered or threatened species.[23] To satisfy this requirement, FERC directs project sponsors to engage in informal consultation with NMFS and/or FWS to determine whether the project will impact a federally listed species.[24] Unless NMFS or FWS concludes that the proposed hydroelectric facility is not likely to adversely affect federally listed species, the project sponsor must prepare a Biological Assessment containing the results of detailed surveys, potential impacts, and proposed mitigation to eliminate or minimize such impacts.[25] Where the consulting agency concludes that the project will result in the "incidental take"[26] of listed species, NMFS or FWS will prepare a Biological Opinion that may include reasonable and prudent measures to avoid jeopardy and must include a statement specifying the impact (*i.e.*, the

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[21] 18 C.F.R. §§ 4.51(f), 4.41(f).

[22] *Id.*

[23] 16 U.S.C. § 1536.

[24] 18 C.F.R. § 380.13.

[25] *See* 18 C.F.R. § 380.13(b).

[26] "Incidental take" refers to "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity." 50 C.F.R. § 402.02.

amount or extent of incidental take), and reasonable and prudent measures considered necessary or appropriate to minimize the take of listed species.[27] Through this process, FERC will determine, in consultation with federal fish and wildlife agencies, which conservation and mitigation measures should be implemented to minimize impacts. In other words, the ESA process frequently results in the imposition of measures to protect listed species that might be impacted by operations of hydroelectric facilities, including the diversion of cooling water.

NEPA review requires the development by FERC of a Finding of No Significant Impact ("FONSI"), an Environmental Assessment ("EA"), or an Environmental Impact Statement ("EIS") for a project. Entrainment, impingement, and other impacts on fish and wildlife are analyzed in these environmental documents. For example, within the EA for a hydroelectric project in Arkansas, FERC concluded that "[b]ased upon [Arkansas Game and Fish Commission] observations, current levels of turbine entrainment and mortality of fish is [sic] not considered to be a significant issue at these projects."[28] Likewise, comprehensive entrainment studies were developed as part of the application process for the Catawba-Wateree and Yadkin-Pee Dee hydroelectric projects spanning the Carolinas. The EIS for the Catawba-Wateree project found that "entrainment does not appear to adversely affect survival and growth of young of target sport and forage species populations,"[29] and the EIS for the Yadkin-Pee Dee project found that there is "no indication that entrainment is having significant adverse effects on resident fish populations, because project reservoirs and riverine reaches support robust fish

[27] *See* 16 U.S.C. § 1536(b)(4); *see also* 50 C.F.R. § 402.15(i).

[28] FERC, Environmental Assessment for Hydropower License, Project No. 271-062, at 66 (Dec. 2001).

[29] FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2232, at 178 (July 2009).

populations and an excellent sport fishery."[30] Similarly, for the Smith Mountain Hydroelectric Plant, a pumped storage facility in Virginia, an entrainment study qualitatively evaluated entrainment for selected species based on reservoir and turbine intake characteristics, water velocity and swim speed data, and life history characteristics.[31] FERC concluded in the EIS for the project that the "loss of individual fish from entrainment and mortality is not expected to result in any substantial effects to the fishery at the Project."[32] The analyses above address entrainment associated with all water passing through the projects, including the enormous amounts of water that go through the turbines for electricity generation. While these studies generally do not focus on entrainment specific to the small pipes and other structures – often within or off of the penstocks – that various hydroelectric facilities use to divert water for service water and cooling purposes, withdrawals and entrainment impacts from these cooling water diversions would be exceptionally smaller. In addition, FERC frequently addresses the issue of fish impingement and entrainment by requiring licensees to screen their intakes to prevent or minimize fish from entering the penstock, which can eliminate or reduce the possibility of impingement or entrainment during the diversion of water from the penstock for cooling purposes.

Furthermore, CWA § 401 provides states broad authority to impose conditions as part of state-issued water quality certificates in the context of the licensing and relicensing of projects. FERC may not issue a license unless the state has either issued or waived the water quality certificate. States have used this authority to impose conditions related to fisheries, aesthetics,

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[30] FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2206, at 138 (Apr. 2008).

[31] *See* FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2210, at 119-126 (Aug. 2009).

[32] *Id.* at 126.

recreation, and more.[33] Such conditions are considered "mandatory," meaning that FERC has no discretion but to include them in a license.

In addition, approximately 29 facilities in Massachusetts and 15 facilities in New Hampshire have been certified by the Low Impact Hydropower Institute ("LIHI").[34] LIHI is a non-profit organization that certifies hydroelectric facilities as "low impact" if the facility satisfies all eight of the established environmental criteria. For example, to obtain certification, a facility must demonstrate that it maintains safe, timely, and effective downstream and upstream fish passage for migratory species, protects the water quality of all water bodies directly affected by the facility, and does not negatively impact threatened or endangered species.[35] Facilities apply for LIHI's voluntary certification only after they have completed the rigorous FERC process and obtained their license.[36]

In accordance with the authorities described above, fish and wildlife agencies often recommend protection, mitigation, and enhancement measures to offset any known impacts of hydroelectric facilities for aquatic species. In some cases, FERC license conditions may go further than the 2014 Rule would to minimize adverse environmental impacts associated with hydroelectric operations because they can include habitat restoration which, although not allowed as BTA for steam electric and manufacturing facilities covered by the Existing Facilities Rule, serves to provide habitat for individual species, life stages (such as spawning and rearing of young), or entire communities of aquatic organisms affected by hydroelectric operations.

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[33] *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) (holding FERC-licensed dams must comply with state certification that required operator to maintain stream flow and allow passage for certain fish and eels).

[34] *See* LIHI, Certified Facilities, *available at* https://lowimpacthydro.org/certified-facilities/.

[35] *See* LIHI, Certification Handbook, *available at* https://lowimpacthydro.org/wp-content/uploads/2016/03/2nd-edition-handbook-20160315-rev2.02-7-20-16.pdf.

[36] *See* LIHI, Certification Handbook § 4.5.1.

Thus, the FERC licensing process already provides for measures to minimize adverse environmental impacts of hydroelectric operations and may, at times, be more stringent than § 316(b) requirements. Any imposition of § 316(b) requirements, either through application of the 2014 Rule or a case-by-case BPJ determination, would be duplicative of existing federal and state requirements already in place. As the Alabama Department of Environmental Management ("ADEM") has recognized, "[t]he purpose of 316(b) of the [CWA] is to reduce mortality to fish and other aquatic organisms impacted by cooling water intake structures," but, for hydroelectric facilities, "the impacts to aquatic organisms are already addressed" and "have been extensively studied under the [NEPA] and [FERC] regulatory frameworks and subsequently granted 401 certifications."[37]

IV. EPA's 2014 Rule for Existing Facilities Did Not Consider Hydroelectric Facilities.

Even if CWA § 316(b) were applicable to hydroelectric facilities, which it is not, the Region's proposed BPJ requirements are arbitrary and capricious because the Region borrowed from and relied on a rule that EPA expressly stated did not apply to hydroelectric facilities and that the Agency adopted without any consideration of the technical feasibility or cost of application to hydroelectric facilities.

A. EPA Has Never Provided Notice or an Opportunity to Comment on the Applicability of § 316(b) Requirements to Hydroelectric Facilities.

Under the APA, 5 U.S.C. § 553(b)(3), an agency must publish in the *Federal Register* a notice of proposed rulemaking, which "shall include … either the terms or substance of the proposed rule or a description of the subjects and issues involved." After the notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). The APA's notice-and-

[37] *See* ADEM General Permit Rationale, Hydroelectric Facilities ALG360000, at 3 (Aug. 18, 2015).

comment mandate is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of America v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). These procedures "ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994).

To ensure regulated entities have fair notice, "the final rule the agency adopts must be a 'logical outgrowth' of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). Under this principle, the law asks "whether the affected party 'should have anticipated' the agency's final course in light of the initial notice." *Covad Commc'ns. Co. v. FCC,* 450 F.3d 528, 548 (D.C. Cir. 2006) (citation omitted). While a final rule need not be an exact replica of the proposed rule, "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

As explained above, prior to the implementation of the 2014 Rule, there had never been any indication from EPA or Congress that CWA § 316(b) could apply to hydroelectric facilities. Moreover, there was no way to anticipate from the proposed Existing Facilities Rule that EPA would apply the technology-based standards to hydroelectric facilities. Hydroelectric facilities had no notice that those facilities could be subject to new NPDES requirements as a result of the 2014 rulemaking, nor were they provided an opportunity to comment on the many ways in which technologies that EPA evaluated for steam electric power and manufacturing plants cannot be

considered BTA for hydroelectric facilities. In the preamble to the proposed rule for existing facilities, EPA explicitly stated that withdrawals from hydroelectric facilities were not meant to be addressed by the Existing Facilities Rule:

> Given the diversity of industrial processes across the U.S., there are many other industrial uses of water not intended to be addressed by today's proposed rule .... Warming water at liquefied natural gas terminals, and *hydro-electric plant withdrawals for electricity generation are not cooling water uses and are not addressed by today's proposal* ....

76 Fed. Reg. at 22,190 (emphasis added).

In light of EPA's history of *not* applying CWA § 316(b) to hydroelectric facilities and because EPA's explicit statements confirmed that hydroelectric facilities would not be covered by the Existing Facilities Rule, private and public entities that own or operate hydroelectric facilities did not provide comments to address the potential impacts of the Existing Facilities Rule's proposed requirements.[38] Applying the Existing Facilities Rule to hydroelectric facilities, therefore, cannot be a logical outgrowth of the proposed rule. Thus, any attempt now by EPA to apply the Rule's requirements to hydroelectric facilities, which has been done only on rare occasions through post hoc determinations for particular facilities[39] and now in the Proposed Permit, is contrary to the APA's requirements for fair notice and opportunity for comment.

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[38] There is no reference to hydroelectric facilities in EPA's 467-page response to comments document. Response to Comments Document for the Final 316(b) Existing Facilities Rule (May 19, 2014) (EPA-HQ-OW-2008-0667-3679).

[39] In one of the few instances where EPA has asserted that § 316(b) and the 2014 Rule apply to hydroelectric facilities, it is clear that EPA's determination was made behind the scenes, well after the 2014 Rule was promulgated, and without a notice-and-comment rulemaking that evaluated the potential implications of such a determination. The 2016 NPDES Permit Fact Sheet for the Smith Mountain Hydroelectric Plant in Virginia stated, "Significant discussion was held during this reissuance regarding the applicability of CWA section 316(b). [The applicant's] position is that hydropower stations are not subject to section 316(b). However, after consultation with EPA, a determination was made that the facility is subject to CWA 316(b) and the [Existing Facilities] Rule. The determination was that § 316(b) 'applies' to hydropower facilities if waters of the U.S. are withdrawn and used for cooling purposes." VPDES Permit Program Fact Sheet, Permit No. VA0088765, at ¶ 30 (June 13, 2016). Other states that have considered the issue have determined that § 316(b) does not apply to hydroelectric facilities, *see, e.g.,* ADEM General Permit Rationale, Hydroelectric Facilities ALG360000 (Aug. 18, 2015) (ADEM agrees that the § 316(b) rule is "not applicable" to hydroelectric facilities), or have continued to issue NPDES permits for hydroelectric facilities without § 316(b) requirements, *see, e.g.,* South Carolina Department of Health and

B. EPA Did Not Consider Technologies for Hydroelectric Facilities or Evaluate the Potential Impacts of Applying the Rule's BTA Standards to Hydroelectric Facilities.

EPA's final 2014 Rule and preamble provide no discussion of the applicability of § 316(b) or the Rule to hydroelectric facilities. In fact, the administrative record for the 2014 Rule is replete with indications that EPA did not consider impacts to hydroelectric facilities when evaluating potential technologies or the associated costs and benefits. For example, in the Economic Analysis for the final 2014 Rule, EPA stated that "[t]he final rule is only relevant for power generators that use substantial amounts of cooling water, and … [o]nly prime movers with a *steam-electric generating cycle* use large enough amounts of cooling water to be subject to the final rule."[40] The analysis goes on to describe steam electric facilities as those generating units that are fueled by "coal, gas, oil, waste, nuclear, geothermal, and solar steam."[41] EPA does not include hydroelectric facilities in its analysis of the economic impact of the Rule on electric generation units, nor does EPA analyze the economic impact of the rule on hydroelectric facilities, in particular.[42] Likewise, in the Technical Development Document for the 2014 Rule, EPA includes the following exhibit that provides the estimated number of facilities that would be subject to the 2014 Rule by fuel type and prime mover category, but the table does not include hydroelectric facilities:

Environmental Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015); North Carolina Department of Environment and Natural Resources, NPDES General Permit No. NCG50000 (Oct. 1, 2015).

[40] Economic Analysis for the Final 316(b) Existing Facilities Rule at 2A-4 (May 2014) (emphasis added) ("2014 Economic Analysis").

[41] *Id.*; *see also* Technical Development Document for Final Section 316(b) Existing Facilities Rule at 4-23 (May 19, 2014) ("2014 TDD") ("Only prime movers with a steam-electric generating cycle use large enough amounts of cooling water to fall under the scope of the proposed rule.").

[42] In fact, the only discussion of hydroelectric facilities in EPA's Economic Analysis is a general description of hydroelectric facilities' contribution to electricity generation. *See* 2014 Economic Analysis at 2A-3.

Exhibit 4-26. 316(b) electric power facilities by plant type and prime mover

Plant type[a]	Prime mover	Number of 316(b) electric generators[b,c]
Coal steam	Steam turbine	342
Gas	Steam turbine	73
Nuclear	Steam turbine	56
Oil	Steam turbine	29
Other steam	Steam turbine	25
Total steam	Steam turbine	525
Combined cycle	Combined cycle	33
Total		559

[a] Facilities are listed as steam electric if they have at least one steam electric generating unit.
[b] Facility counts are weighted estimates generated using the original 316(b) survey weights.
[c] Individual values do not sum to reported total due to rounding as the result the application of statistical weights.
Sources: U.S. EPA, 2000; U.S. DOE, 2007 (GenY07); U.S. EPA Analysis, 2010

2014 TDD Exhibit 4-26.

Similarly, EPA's benefit analyses did not consider hydroelectric facilities. To evaluate the benefits of the 2014 Rule's requirements, EPA extrapolated data from 98 model facilities based on information EPA received in the 2000 ICR.[43] In its 2000 ICR, however, EPA did not request information from any hydroelectric facilities. EPA ultimately narrowed its research activities to focus on traditional utilities, nonutility power producers, and four other industrial categories that utilize large quantities of cooling water. "Traditional utilities and nonutility power producers that use cooling water were further limited to those plants that generate electricity by means of steam as the thermodynamic medium (steam electric) because they are associated with large cooling water needs."[44] Therefore, hydroelectric facilities, which do not generate electricity through the use of steam, were excluded from EPA's original data request, which was later used to support EPA's analysis of the Existing Facility Rule's benefits.

[43] *See* Benefits Analysis for the Final Section 316(b) Existing Facilities Rule at 3-5 (May 2014).

[44] Information Collection Request, Detailed Industry Questionnaires: Phase II Cooling Water Intake Structures & Watershed Case Study Short Questionnaire at 4 (Aug. 18, 1999).

EPA estimated that the 2014 Rule would cover 1,065 facilities (including 544 electric generators, 509 manufacturers in six primary manufacturing industries, and 12 manufacturers in other industries). 79 Fed. Reg. at 48,405. EPA made no attempt to determine whether any of the nation's 2100 hydroelectric facilities would meet the Rule's thresholds (have NPDES permits, use one or more CWISs with a cumulative DIF of greater than 2 MGD to withdraw water from waters of the U.S., and use 25 percent or more of the water withdrawn exclusively for cooling water purposes). 40 C.F.R. § 125.91(a). Instead, EPA concluded that "[u]nits with water turbines, or 'hydroelectric units,'… do not use a steam loop and do not use cooling water …."[45] As Region 1 now appears to understand, hydroelectric facilities occasionally do use cooling water, although they do so in small amounts, and their use of cooling water certainly was not the focus of the 2014 Rule.

If EPA had actually considered the technical feasibility and cost for application requirements and any technology and associated monitoring requirements for hydroelectric facilities, it would have understood that what is BTA for steam electric power and manufacturing plants is not necessarily BTA for hydroelectric facilities. EPA previously has recognized that a different BTA may be appropriate for other types of facilities with CWISs. For example, EPA determined that, for existing offshore oil and gas platforms, no retrofit technology was BTA. EPA studied the facilities and "could not identify any technologies (beyond the protective screens already in use) that are technically feasible for reducing impingement or entrainment in such existing facilities." 79 Fed. Reg. at 48,310. As discussed in more detail in Section V below, there are similar challenges for hydroelectric facilities.

[45] 2014 TDD at 4-22.

EPA cannot impose § 316(b) requirements on hydroelectric facilities without engaging in proper notice-and-comment rulemaking that evaluates the availability and feasibility of potential technologies *for hydroelectric facilities*. As discussed in more detail in Section VI below, Region 1's Proposed Permit and Fact Sheet, which simply point to the 2014 Rule record's discussion of various technologies in the context of CWIS at steam electric power and manufacturing plants, do not fulfill this requirement. Accordingly, it is unlawful for Region 1 to impose on hydroelectric facilities CWA § 316(b) requirements – whether they are based on BPJ determinations or the 2014 Rule – without following the necessary procedures or conducting this type of evaluation.

V. Even if § 316(b) Did Apply to Hydroelectric Facilities, Which it Does Not, the Requirements of the 2014 Rule Are Not Appropriate for Such Facilities, Which Are Fundamentally Different from Facilities Covered by the Rule.

The requirements that EPA established in the 2014 Rule are not appropriate for hydroelectric facilities, which are fundamentally different from the steam electric power and manufacturing plants EPA considered in that rulemaking.

As discussed above, EPA did not consider hydroelectric facilities in establishing BTA in its 2014 Rule. EPA explained in the preamble to the 2014 Rule that, to establish BTA for the facilities covered by the Rule, EPA considered: "the availability and feasibility of various technologies," "costs associated with these technologies," the technologies' economic impacts, "effectiveness of these technologies in reducing impingement mortality and entrainment," and additional factors, such as "location, age, size, and type of facility." 79 Fed. Reg. at 48,328. For this analysis, EPA made a number of assumptions based on data and information from steam

electric power plants and manufacturing plants that do not take into account technology costs or feasibility for hydroelectric facilities.[46]

The assumptions that EPA made for the facilities it considered in its 2014 Rule do not necessarily apply for hydroelectric facilities. There are numerous different configurations for hydroelectric facilities and, in particular, their pipes and structures that divert cooling water. Nearly every facility has unique, location-specific design attributes to take maximum advantage of the hydraulics of that unique physical location. For example, some hydroelectric facilities have a hole bored through the penstock in which a perforated flange is used to attach a small pipe used to gravity feed service and cooling water equipment. Some hydroelectric facilities have pipes that come off the scroll case. Others have separate pipes that come off the face of the dam. For these three configurations, water that is gravity- or pressure-induced feeds through the pipe to cool and service the equipment. Other facilities have separate intake pump houses upstream of the powerhouse. For those facilities, there is a distinct and separate intake used for service water and cooling purposes. Pumped storage facilities pump water from lower reservoirs to higher elevation reservoirs during times of low electric demand and then release water from the upper reservoir to drive turbines during periods of high electric demand. In one pumped storage facility, cooling water is drawn from the cavity between the inner and outer walls of the power house, while service water is drawn from a single intake at the tailrace of the plant.

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[46] For example, in evaluating impingement data and performance standards, EPA relied on 26 impingement mortality data sets at 17 facilities, none of which included hydroelectric facilities. 79 Fed. Reg. at 48,323; 2014 TDD Exhibit 11-3. As another example, in the final rule, EPA adjusted its assumptions for costs of modified traveling screens with fish returns in response to feedback that its proposal had underestimated those costs. 79 Fed. Reg. at 48,324. The adjustments EPA made in its evaluation of technology costs included: to correct its misplaced assumption that modified traveling screens were available at most facilities, EPA assigned higher cost technologies (*e.g.*, larger intakes, wedgewire screens with through-screen design velocities of 0.5 fps) for intakes that use passive screens; EPA increased capital costs for the fish return component and included additional costs for those with particularly difficult circumstances, such as very long intake canals and submerged offshore intakes. *Id.*; 2014 TDD at 8-2 to 8-6 (explaining EPA's model facility approach and modifications to the cost tool). EPA did not consider application of the technology to hydropower facilities.

Given the wide range of configurations for hydroelectric facilities and different processes for diverting water for cooling, the technologies that EPA found to be the best available technologies and sampling requirements for steam electric power plants and manufacturing plants are not necessarily appropriate or practical for hydroelectric facilities.

For example, at many hydroelectric facilities, conducting impingement or entrainment sampling at the pipe or structure taking in cooling water would be very difficult, or even unsafe, due to turbulence. Sampling equipment may not be able to withstand water flows and forces and could break away, potentially damaging the facility.

In addition, many of the impingement technology options that are established as BTA in the 2014 Rule would not be feasible at most hydroelectric facilities. For example, one of the impingement options is to use a maximum 0.5 feet per second through-screen design velocity, 40 C.F.R. § 125.94(c)(2). This is also one of the compliance options in the Region 1 Proposed Permit. *See* Proposed Permit at 26. For many hydroelectric facilities, however, the only way to retrofit an intake pipe within the penstock to meet that through-screen design velocity would be to increase the size of the intake opening, which in some cases would require dam reconstruction and could actually increase entrainment because of the increase in the volume of water passing through the intake. Similarly, another impingement option in both the 2014 Rule and the Region 1 Proposed Permit is to operate an intake structure with a maximum through-screen velocity of 0.5 feet per second, § 125.94(c)(3); Proposed Permit at 26, but it would be impossible to measure the actual velocity at the intake for most hydroelectric facilities because the magnitude and force of the water is so great as it is going through the penstock that no monitoring equipment could be located near the intake. Nor would it be feasible to install modified traveling screens, § 125.94(c)(5), on the small pipes that are used by many hydroelectric facilities to take in cooling

water, even where such pipes withdraw water directly from the source waterbody. At least three of the impingement options, §§ 125.94(c)(5)-(7), require an impingement technology performance optimization study, which would be very difficult, if not impossible, for many hydroelectric facilities that would not be able to conduct impingement sampling at the intake.

Indeed, the 2014 Rule's requirements would not be necessary in most cases because the rates of impingement and entrainment would be so low that additional controls would not be warranted. Some hydroelectric facilities have in place screens to prevent debris of a certain size from entering the penstock (and therefore the cooling water pipe), and at many facilities, the water passes through a strainer before being used for cooling purposes. Some of these strainers are backwashed to a plant sump. In our members' experience, fish are rarely (if ever) observed in strainer baskets or in backwash to the plant sump. Moreover, for many hydroelectric facilities, due to the high velocity and volume of water passing through the penstock and by the entrance to the intake, the rates of impingement would be so low that additional impingement controls would be useless. The same is true for entrainment at many of these facilities. For hydroelectric facilities, the *de minimis* exception for impingement established in the 2014 Rule, 40 C.F.R. § 125.94(c)(11), would be applicable more often than not. And the fact that there is not a *de minimis* exception for entrainment in the 2014 Rule would create issues for many hydroelectric facilities that would have no way of further minimizing the already very minor rates of entrainment.

EPA clearly did not consider hydroelectric facilities when it was establishing the requirements under the 2014 Rule. As explained above, such requirements are not appropriate or feasible for hydroelectric facilities, which are fundamentally different from facilities covered by the 2014 Rule.

VI. The § 316(b) Measures Required in Region 1's Proposed General Permit Are Inappropriate for Hydroelectric Facilities.

Even if § 316(b) applied to hydroelectric facilities, which it does not, the measures that Region 1 proposes as BTA in the Proposed Permit are inappropriate for the hydroelectric facilities to which the Proposed Permit, if finalized, would apply. Under Region 1's proposed BTA requirement, the applicant must implement at least one of three options within 90 days of receiving authorization to discharge under the permit. *See* Proposed Permit § 4.2. We address each of these options in turn.

A. Section 4.2(a) – Physical or Behavioral Barrier

As discussed above, we do not agree that CWA § 316(b) applies to hydroelectric facilities. But, even if it did, the first measure proposed by Region 1 goes well beyond EPA's limited authority under § 316(b) to set technology requirements for cooling water intake structures. This measure requires permittees to install a physical or behavioral fish barrier at the first intake on the upstream side of the dam that will safely direct fish towards a downstream passage without being exposed to the CWIS. Proposed Permit at 28. Instead of requiring a particular technology for the intake withdrawing cooling water, this requirement applies to hydroelectric facilities as a whole, including parts of the facility that are not part of the process for diverting cooling water. As noted above, cooling water is often diverted from the penstock or the turbine scroll case and not necessarily from the source waterbody. Thus, this permit imposes a requirement on the dam itself instead of the "location, design, construction, and capacity" of the CWIS as provided for in CWA § 316(b). Indeed, the purpose of this proposed measure is to convey the fish over the dam so that they are not exposed to the CWIS. *See* Proposed Permits § 4.2(a). The CWA does not authorize EPA to require such technologies.

Section 316(b) mandates that any standard established pursuant to §§ 301 or 306[47] "shall" require that the "location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." CWA § 316(b) defines the outer boundaries of EPA's authority to regulate CWISs. Nothing else in the CWA authorizes EPA to regulate beyond discharges in NPDES permitting. And only EPA (or NPDES permit writers acting under CWA § 402(a)(1)(B), where EPA has not acted) may establish requirements necessary to implement §§ 301 and 306. Thus, § 316(b) instructs EPA to decide what intake technologies constitute the BTA for "minimizing adverse environmental impact."

No one would argue that the effects of intake structures on threatened or endangered species or their designated critical habitat are not among the "adverse environmental effects" that Congress contemplated BTA requirements would "minimize." But § 316(b) does not authorize EPA, or a permit writer making a site-specific determination at EPA's behest, to require technologies or other control measures, such as Region 1's proposed physical or behavioral barrier compliance option, that go beyond the standards reflecting the technologies for CWIS location, design, construction, and capacity.

In addition, Region 1 lacks adequate justification for this condition. The Fact Sheet suggests that the fish passage requirement is appropriate because it has already been adopted by many facilities in Massachusetts and New Hampshire. The Fact Sheet indicates that, as noted above, hydroelectric facilities are subject to FERC license requirements, which often include downstream fish passage technology. Also, a number of facilities in the Region have received voluntary certification from the LIHI, which requires upstream and downstream fish passage

[47] Section 301, 33 U.S.C. § 1311, addresses effluent limitations that may apply in § 402 permits, and § 306, 33 U.S.C. § 1316, governs standards of performance related to discharges under § 402 permits.

protection measures. Fact Sheet at 25-26. Simply because certain facilities operate fish passage technology in accordance with a voluntary program, or a FERC license, does not expand EPA's authority under the CWA and does not allow a NPDES permit writer to incorporate the same conditions under the guise of § 316(b).

As discussed above, it is solely within FERC's authority under the FPA to impose requirements relating to the use of water by non-federal hydroelectric facilities. In fact, FPA section 18 authorizes FWS or NMFS to prescribe "fishways" at FERC-licensed projects. 16 U.S.C. § 811. As the Region's rationale for this condition suggests, *see* Fact Sheet at 25-26, with this proposed measure, EPA attempts to incorporate a FERC requirement into a NPDES permit. In addition to going beyond EPA's authority, the proposed requirement would duplicate, and at times could interfere with, FERC's efforts to establish appropriate measures to minimize or mitigate impacts to aquatic species in consultation with FWS or NMFS, and would not create an environmental benefit beyond what is already imposed in a FERC license.

Importantly, the Proposed Permit, if finalized, could be interpreted to suggest that a requirement to implement and maintain physical or behavioral fish barriers is a lawful and appropriate § 316(b) condition of a NPDES permit. Even if it were a lawful condition (which it is not), many of UWAG members' hydroelectric facilities located across the country do not maintain physical or behavioral fish barriers. A physical barrier is infeasible in many situations. A barrier placed across the front of a dam would need to span hundreds to thousands of feet perpendicular to flow and extend to great depths exposing it to huge forces (varying flows) and debris (leaves, logs, trash, etc.), and would require frequent maintenance. While there may be some behavioral barrier technologies available, they are not effective on all or most species. As such, even if one assumes that most operators of hydroelectric facilities in Massachusetts and

New Hampshire already maintain fish passage technologies at their facilities, if other Regions or States, which may view the Region 1 permit as a model, were to adopt a requirement similar to the first option in Region 1's Proposed Permit, it would impose a significant, costly, and inappropriate regulatory burden on many operators.

B. Section 4.2(b) – Intake Velocity

As a second option for compliance, Proposed Permit § 4.2(b) indicates that if the cooling water is withdrawn directly from the penstock, that facility can comply with the Permit's BTA requirements by ensuring that the "velocity at the cooling water intake shall not exceed 0.5 fps." As its only support for this requirement, the Fact Sheet cites pages in the preambles for the Phase I Rule and 2014 Existing Facilities Rule wherein EPA provided technical analysis for a 0.5 fps velocity requirement for CWIS at steam electric power and manufacturing plants which involve use of pumps to actively *withdraw* cooling water from surface waters of the U.S. *See* Fact Sheet at 26 (citing 66 Fed. Reg. at 65,274 (preamble for the Phase I Rule) and 79 Fed. Reg. at 48,325-26, 48,336-7 (preamble for 2014 Existing Facilities Rule)). These snippets of analysis on CWIS through-screen velocity are inapposite for hydroelectric facilities, which are diversion structures by design – impounding water and transporting/passing water along a contiguous waterway to turn turbines used to generate electricity. As noted above, EPA never considered hydroelectric facilities in its evaluation of appropriate technologies during the Phase I and Existing Facilities rulemakings. Nor do the scientific reports cited in the preambles address CWIS at hydroelectric facilities.[48]

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[48] In the preamble for the Phase I Rule, EPA cites three studies that it used to help determine appropriate velocity thresholds based on fish swimming speeds and endurance. *See* 66 Fed. Reg. at 65,274 (citing Electric Power Research Institute, *Technical Evaluation of the Utility of Intake Approach Velocity as an Indicator of Potential Adverse Environmental Impact under Clean Water Act Section 316(b)* (Dec. 2000); Smith, L.S. and L.T. Carpenter, Fisheries Institute, University of Washington, *Salmonid Fry Swimming Stamina Data for Diversion Screen Criteria* (Dec. 1987); Turnpenny, A.W.H., Central Electricity Generating Board, *The Behavioral Basis of Fish Exclusion from Coastal Power Station Cooling Water Intakes* (Aug. 1988).. While these reports contain some

The Fact Sheet reflects no analysis of whether such a requirement would be appropriate for hydroelectric facilities and no attempt to characterize or consider the wide range of variation among existing cooling water intakes at hydroelectric facilities. That variation is important because site-specific factors may make it difficult or impossible for many facilities to comply with some or all of the proposed requirements. As noted above in Section V, for many hydroelectric facilities, it would be impossible to measure the velocity at the intake because the magnitude and force of the water going through the penstock is so great that no monitoring equipment could be located near the intake. Further, in some cases, the only way to retrofit an intake pipe within the penstock to satisfy velocity requirements would be to increase the size of the intake opening, which could require dam reconstruction. Indeed, in evaluating technologies for CWIS at steam electric power and manufacturing plants that withdraw from the source waterbody, EPA has recognized that "[s]pace constraints … may preclude expanding an existing intake structure … to reduce intake velocity" and that "[a]t existing facilities, … many of these modifications are more problematic due to space constraints and interference with existing systems, and may not be practical options given their cost and complexity." 2014 TDD at 6-65. 2014 TDD at 12-6. These space constraints are even more pronounced for many hydroelectric facility configurations.

Moreover, for many hydroelectric facilities that withdraw cooling water from the penstock, it would be nearly impossible to reduce the intake velocity because the cooling systems are designed for specific flow-through and are typically not controlled by pumps. For example, in a 2007 relicensing study for the Leesville facility (a hydroelectric facility downstream from the Smith Mountain pumped storage project) various flows at different points

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discussion of hydroelectric facilities, it is limited to discussion of the intake approach velocity at the penstock. It does not address velocities for cooling water intake structures at hydroelectric facilities.

were measured, modeled, and calculated.[49] The average reservoir flow velocity was 1.8 fps, the average velocity at the powerhouse intake face was 2.2-2.9 fps, the average through-screen velocity was 2.8-3.9 fps and the average velocity within the penstock was 4.8 fps. Because the cooling water intake at this facility is located within the penstock, the velocity at the opening was 4.8 fps. Thus, reducing the velocity from 4.8 fps to 0.5 fps would be impractical if not impossible. Therefore, to comply with this provision, operators would likely have to install closed-loop cooling or find an alternate cooling water source, such as groundwater. EPA has not provided any analysis of such constraints and potential costs and benefits for hydroelectric facilities. If it had, it would have learned that the burden of retrofitting the pipe to reduce intake velocity would in many cases result in costs and burdens that likely far exceed any environmental benefits, and, in many cases, it simply would not be feasible.

It is difficult to understand how Region 1 could have exercised its BPJ that the intake of cooling water at hydroelectric facilities requires further control without first collecting at least some information from which to evaluate whether the changes to the pipe used by a hydroelectric facility to divert relatively small amounts of water (that otherwise would flow through the facility) for cooling purpose would have any meaningful environmental benefit. As explained above, for many hydroelectric facilities, due to the high velocity and volume of water passing through the penstock and by the entrance to the intake, rates of impingement and entrainment would be so low that additional controls would be useless. Indeed, in many cases, reducing intake velocity at the pipe would not result in environmental benefit because, even if fish could avoid being impinged or entrained by the pipe, those same fish would still pass through the turbine. Even if it were appropriate to apply § 316(b) to these facilities (which

[49] *See* Devin Tarbell & Associates, Inc., Smith Mountain Pumped Storage Project (FERC No. 2210), Intake Velocity Study Report, at 2, Tbl. 1 (June 2007).

UWAG believes it is not), the exercise of BPJ for existing facilities requires at least some understanding of the location, design, construction, and capacity of the "intake structures" involved and the environmental impacts occurring. Region 1 has put the cart before the horse, imposing new BTA requirements without first evaluating the attributes of the facilities in question and whether additional controls are appropriate. Thus, Region 1 has not only failed to evaluate how the intake velocity requirement would impact most hydroelectric facilities, but also failed to adequately justify such a condition.

C. Section 4.2(c) – Physical Screen

Under the third BTA option, when cooling water is withdrawn directly from the source waterbody, the CWIS "must be equipped with a physical screen of sufficient mesh size to minimize the potential for adult and juvenile fish to become entrained. The through-screen velocity at the cooling water intake shall not exceed 0.5 fps." Proposed Permit § 4.2(c). This compliance option is inappropriate for hydroelectric facilities for many of the same reasons that the second compliance option is inappropriate. EPA has not evaluated whether this technology is feasible for hydroelectric facilities, or whether facilities could measure the actual velocity at the intake. It has not considered whether additional controls are needed given that impingement and entrainment is likely very low. Nor has it considered the costs and potential benefits of installing a "physical screen of sufficient mesh size" on the small pipes that are used by many hydroelectric facilities to take in cooling water. Indeed, if a facility was not required to install control measures or to implement mitigation measures during the licensing process, then the costs of complying with this option likely far exceed any environmental benefits.

In addition, this ambiguous standard provides EPA with too much discretion. The 2014 Rule defines the appropriate mesh size for physical screens that will meet BTA, but Region 1 does not define the size of the screens that it anticipates that facilities would install to comply

with this option. Instead, the proposed measure calls for "sufficient" mesh size to "minimize" the "potential" for entrainment. These vague and subjective terms are unhelpful and do not provide a clear standard. Similarly, invoking the term "entrained," which normally refers to eggs, larvae, and very small fish, where impingement is more appropriate, further confuses the issue.

Finally, section 4.2 requires that the permittee implement at least one of the measures discussed above within 90 days of receiving authorization under the proposed permit. But EPA has not evaluated or explained whether it is practical or feasible for a hydroelectric facility to implement these measures within a 90-day time frame. The proposed timeline is likely too short for many facilities to safely implement the compliance measures. For example, to install a new physical or behavioral barrier or to reconstruct portions of the dam to satisfy velocity requirements would likely require more than 90 days to complete. This time frame also further demonstrates the arbitrary and capricious nature of EPA's proposed action. Region 10's proposed NPDES permit for hydroelectric facilities granted applicants double the amount of time – 180 days – to implement BTA requirements. EPA does not explain why Region 1 has cut the compliance deadline in half.

In sum, the availability and cost of these specific technologies and measures, the impact of those costs on affected facilities, and the environmental benefits of requirements based on those technologies are all important factors that EPA acknowledged it needed to consider before establishing its nationally applicable § 316(b) regulations for steam electric power and manufacturing plants. EPA also considered feasibility, cost, and benefits in establishing permit application requirements, including those dealing with biological monitoring and other data collection and analysis, reporting, and recordkeeping. Based on its consideration of those

factors, EPA was unable to justify imposing any specific BTA technology requirements on facilities below the applicable flow threshold or any uniform application requirements for entrainment for facilities with "actual intake flows"[50] at or below 125 MGD. EPA also determined it could not set BTA for existing offshore oil and gas platforms, seafood processing vessels, or offshore liquefied natural gas import terminals because it could not "identif[y] a uniformly applicable and available technology for minimizing impingement and entrainment mortality at these facilities." 76 Fed. Reg. at 22,196. Likewise, Region 1 may not impose new § 316(b) requirements to hydroelectric facilities without evaluating whether the requirements are available for the facilities in question and, if so, their costs and benefits. In particular, the Region failed to consider the important social costs (*e.g.*, energy reliability) of imposing new requirements.

D. Section 4.3 – Additional Information for Site-Specific BTA Requirements

The Proposed Permit requires the permittee to submit a number of site-specific reports describing intake volume and water withdrawal information. Based on this site-specific information, EPA may impose additional requirements using BPJ. *See* Fact Sheet § 4.3. UWAG provides the following specific comments on the reporting requirements:

- EPA requests maximum monthly average intake data during the previous five years, but these data may not be collected at hydroelectric cooling water intakes because the intake volume is so small.
- EPA requests a calculation of intake velocity at the CWIS in feet per second, but, as discussed above, intake velocity may be difficult to determine and would require the facility to make a number of assumptions to produce such a calculation.

[50] Actual Intake Flow ("AIF") "means the average volume of water withdrawn on an annual basis by the cooling water intake structures over the past three years. After October 14, 2019, Actual Intake Flow means the average volume of water withdrawn on an annual basis by the cooling water intake structures over the previous five years. Actual intake flow is measured at a location within the cooling water intake structure that the Director deems appropriate. The calculation of actual intake flow includes days of zero flow. AIF does not include flows associated with emergency and fire suppression capacity." 40 C.F.R. § 125.92(a).

- EPA requests a characterization of the habitat upstream of the dam, including descriptions of resident and migratory fish species. To fulfill this requirement the applicant may include the biological characterization of the habitat completed during FERC licensing. The fact that EPA is suggesting that it will rely on data collected during the licensing process to assess the environment demonstrates, again, that this process is duplicative and will provide little, if any, environmental benefit.

VII. Conclusion

In sum, EPA Region 1 should not apply CWA § 316(b) to hydropower facilities. Section 316(b) was intended by Congress to address CWIS at steam electric and similar facilities, not hydropower projects. Furthermore, EPA CWIS regulations do not call for application of § 316(b) to hydropower facilities, and those regulations were not developed with any consideration of doing so, making it highly inappropriate for Region 1 to seek to impose the regulations or elements of them on the facilities. As noted above, the FPA and CWA § 401 fully protect both water quality and fish and wildlife in the context of hydropower facilities. Therefore, Region 1 should remove any § 316(b)-related provisions from the Proposed Permit.

UWAG appreciates the opportunity to comment on the Proposed Permit and provide factual information regarding operation of our members' hydroelectric facilities. No commenter, however, can make up for the lack of a comprehensive administrative record in the first instance that provides the Agency's evaluation of the availability and feasibility of potential technologies for hydroelectric facilities. We hope that EPA will pursue our recommendations, and we look forward to working with you to address these meaningful issues.

Message

From: Mann, Rachel [rkmann@hunton.com]
Sent: 10/19/2018 7:13:06 PM
To: Papadopoulos, George [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5def9d742e6e4bbbbeebf45f13686989-Papadopoulos, George]
CC: McGrath, Kerry L. [KMcGrath@hunton.com]; jennifer.wood@state.ma.us [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7e3db25c521446edb472841f8a0236b2-jennifer.wo]; stergios.spanos@des.nh.gov [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bc76eb84e66943c1961b16d9abf7575f-stergios.spanos@des.nh.gov]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: UWAG Comments on EPA Region 1 General Permit for MA and NH Hydroelectric Facilities
Attachments: UWAG Comments on EPA R1 General Permit for MA and NH Hydros 10-19-18_70931736_13-c.PDF

Please see the attached comments of the Utility Water Act Group on the Region 1 proposed NPDES general permit for hydroelectric facilities in Massachusetts and New Hampshire.

HUNTON
ANDREWS KURTH

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UWAG
Utility Water Act Group

October 19, 2018

Via Email

U.S. EPA Region 1
Office of Ecosystem Protection
Attn: George Papadopoulos
5 Post Office Square, Suite 100
Mail Code OEP–06–1
Boston, MA 02109-3912
papadopoulos.george@epa.gov

Re: Comments of the Utility Water Act Group on the EPA Region 1 Proposed NPDES General Permit for Hydroelectric Generating Facilities in Massachusetts (MAG360000) and New Hampshire (NHG360000)

Dear Mr. Papadopoulos:

The Utility Water Act Group respectfully submits the following comments on the EPA Region 1 Proposed NPDES General Permit for Hydroelectric Facilities in the Commonwealth of Massachusetts (MAG360000) and the State of New Hampshire (NHG36000), 83 Fed. Reg. 42,118 (Aug. 20, 2018). We appreciate the opportunity to provide comments on the proposal, which we believe raises significant issues for hydropower project operators in the region and beyond.

If you have any questions about these comments or wish to discuss the issues further, please contact Kerry McGrath at (202) 955-1519 or kmcgrath@HuntonAK.com

We appreciate your attention to this important matter.

Sincerely,

Kerry L. McGrath
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Counsel for the Utility Water Act Group

Message

From: Lee Bridgett [leeb@fb.org]
Sent: 7/19/2018 8:55:18 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
Subject: Thank You for Speaking to the American Farm Bureau Federation's Council of Presidents
Attachments: 2018.07.19 David Ross Thank You Letter.pdf

Mr. Ross,

Please see the attached letter from American Farm Bureau Federation President Zippy Duvall, thanking you for taking the time to speak at the AFBF Council of President's meeting last week.

Best Regards,

Lee Bridgett
Administrative Assistant, Public Affairs
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July 19, 2018

The Honorable David Ross
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dear David:

I wanted to express my appreciation for the time and effort you took to speak to the American Farm Bureau Federation's Council of Presidents. It was evident from your remarks that you are dedicated to leading the Environmental Protection Agency's Office of Water. We are very fortunate to have a public servant with your expertise in that position.

As president of the nation's largest general farm organization, I appreciate your message of collaboration and willingness to work with agriculture. What a breath of fresh air! My staff and the staff of our state Farm Bureau organizations look forward to working with you and your office to make progress on the many important issues you mentioned in your presentation.

We are committed to working with you to find solutions that protect our environment while enabling our farmer members to sustainably produce an abundant supply of affordable food, fiber and fuel. Our state Farm Bureau presidents really appreciated your comments on WOTUS, groundwater connections and nutrients.

Given the important challenges we face, our industry greatly values having someone with your knowledge and experience working with us to find lasting and practical solutions. We trust your counsel, and we appreciate your leadership. Thank you for taking the time out of your busy schedule to speak with us.

Sincerely,

Zippy Duvall
President

Message

From: McGrath, Kerry L. [KMcGrath@hunton.com]
Sent: 7/11/2018 8:55:51 PM
To: Keenan, Dru [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9525dc06e2e74bb89da45f7e19b2e0ca-Keenan, Dru]
CC: Loren.Moore@deq.idaho.gov; Bulleit, Kristy [kbulleit@hunton.com]; Jeff Leahey (NHA) (jeff@hydro.org) [jeff@hydro.org]; 'Thomas A. Stanko' [Thomas.Stanko@cmsenergy.com]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: Joint NHA and UWAG Comments on EPA R10 General Permit for Idaho Hydros 7-11-18
Attachments: Joint NHA and UWAG Comments on EPA R10 General Permit for Idaho Hydros 7-11-18_69876736_23.PDF

Ms. Keenan:
The National Hydropower Association and the Utility Water Act Group submit the attached comments on the EPA Region 10 Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho. We appreciate the opportunity to provide comment on the proposal, which we believe raises significant issues for hydropower project operators in the region and beyond.

If you have any questions about these comments or wish to discuss the issues further, please do not hesitate to contact me.

Thank you,
Kerry

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July 11, 2018

Via E-Mail

Ms. Dru Keenan
Office of Water and Watersheds
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155
OWW-191
Seattle, WA 98101
keenan.dru@epa.gov

Re: Comments of the National Hydropower Association and the Utility Water Act Group on the EPA Region 10 Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho (IDG360000)

Dear Ms. Keenan:

The National Hydropower Association and the Utility Water Act Group respectfully submit the following comments on the EPA Region 10 Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho (IDG360000), 83 Fed. Reg. 18,555 (Apr. 27, 2018). We appreciate the opportunity to provide comment on the proposal, which we believe raises significant issues for hydropower project operators in the region and beyond.

If you have any questions about these comments or wish to discuss the issues further, please contact Kerry McGrath at (202) 955-1510 or kmcgrath@HuntonAK.com

We appreciate your attention to this important matter.

Sincerely,

Jeffrey Leahey
Deputy Executive Director
National Hydropower Association
601 New Jersey Avenue, NW, Suite 660
Washington, DC 20001

Thomas Stanko
Consumers Energy Company
1945 West Parnall Road
Jackson, MI 49201
Chair, UWAG Cooling Systems Committee

Kerry L. McGrath
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
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Counsel to National Hydropower Association and Utility Water Act Group

cc: Loren Moore, Idaho Department of Environmental Quality (Loren.Moore@deq.idaho.gov)
David Ross, EPA Headquarters (Ross.davidp@epa.gov)
Lee Forsgren, EPA Headquarters (Forsgren.lee@epa.gov)
Andrew Sawyers, EPA Headquarters (Sawyers.andrew@epa.gov)
Owen McDonough, EPA Headquarters (McDonough.owen@epa.gov)

The National Hydropower Association and the Utility Water Act Group Comments on EPA's Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho

83 Fed. Reg. 18,555 (Apr. 27, 2018)

July 11, 2018

Executive Summary

With the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 10's proposed National Pollutant Discharge Elimination System ("NPDES") general permit for hydroelectric facilities discharging to waters within the State of Idaho ("Proposed Permit") (IDG360000), 83 Fed. Reg. 18,555 (Apr. 27, 2018), EPA, for the first time in a rule or permitting action of general applicability, takes the position that hydroelectric facilities are subject to the requirements of Clean Water Act ("CWA") § 316(b), 33 U.S.C. § 1326(b), and EPA's 2014 Final Rule to Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014) ("2014 Rule" or "Existing Facilities Rule").

Unlike the other facilities to which EPA has applied § 316(b), EPA has not established technology-based limitations and standards for hydroelectric facilities, nor would it be reasonable to do so given the *de minimis* nature of their discharges. EPA never collected any information on the design, location, construction, and capacity of pipes or other features used to divert water for use in cooling equipment in hydroelectric facilities, or on the environmental impacts of those features. As these comments will show, that omission is crucial because hydroelectric facilities differ substantially from the largely land-based steam electric plants and industrial facilities for which EPA developed the 2014 Rule and every other § 316(b) rule the Agency has adopted. Of equal significance, EPA has never considered any of the legal, technical, or economic issues involved in applying § 316(b) to hydroelectric facilities.

The Proposed Permit nevertheless relies on the 2014 Rule's standards for steam electric power and manufacturing plants to establish the Region's best professional judgment ("BPJ") about what "cooling water intake structure" ("CWIS") is the best technology available ("BTA") "to minimize [the] adverse environmental effects of [CWIS]" at hydroelectric facilities, and

requires that the permit conditions reflecting those technologies be met within 180 days of the effective date of the permit.[1]

There are several key problems with Region 10's proposal. First, interpreting CWA § 316(b) to apply to hydroelectric generation facilities would be a significant expansion of EPA's regulatory jurisdiction and would duplicate other federal and state requirements specifically designed to address these environmental impacts. Second, EPA has never provided notice or an opportunity for comment on the applicability of § 316(b) to hydroelectric facilities. In fact, the Agency explicitly stated that withdrawals from hydroelectric facilities were not meant to be addressed in its Existing Facilities Rule. 76 Fed. Reg. 22,174, 22,190 (Apr. 20, 2011). It would be arbitrary and capricious, and contrary to the Administrative Procedure Act ("APA") requirements for fair notice and opportunity for comment, for EPA to now adopt such a novel, post-hoc interpretation. Third, even if EPA, after full and procedurally appropriate consideration of the issue, concluded that CWA § 316(b) applies to hydroelectric facilities (which NHA and UWAG believe it should not), the requirements of the 2014 Rule are not appropriate for such facilities, which are fundamentally different from the steam electric power and manufacturing plants EPA considered in that rulemaking, both in terms of the feasibility and cost of technology and the assessment of environmental impacts. Indeed, the 2014 Rule's requirements would be unnecessary in most cases because the rates of impingement and entrainment would be so low that additional controls would not be warranted.

In the Proposed Permit, Region 10 proposes to establish new BTA requirements based on its "best professional judgment" without first characterizing and evaluating the attributes of the facilities in question and determining whether they have already minimized adverse

[1] *See* EPA, NPDES Fact Sheet, Proposed Wastewater Discharges from Hydroelectric Generating Facilities General Permit, IDG360000, at 23 (Apr. 27, 2018) ("Proposed Permit Fact Sheet").

environmental effects and without identifying the technologies, measures, procedures, and methods the Agency anticipates facilities would use to meet the requirements imposed by the permit. In fact, it would be very difficult and, in some cases, infeasible, for many hydroelectric facilities to comply with the requirements outlined in the Proposed Permit and, even if some facilities could comply, the costs of doing so would likely far exceed any plausible environmental benefits. For all of these reasons, discussed in more detail in these joint comments, Region 10 should remove any § 316(b)-related provisions from the Proposed Permit. Finally, in addition to the § 316(b)-related measures, a number of discharge-related provisions in the Proposed Permit require clarification and/or revision.

Table of Contents

The National Hydropower Association and the Utility Water Act Group Comments on EPA's Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho

I. Introduction

EPA Region 10 has proposed to issue a NPDES general permit for hydroelectric facilities discharging to waters within the State of Idaho. 83 Fed. Reg. 18,555 (Apr. 27, 2018). With the Proposed Permit, EPA, for the first time in a rule or permitting action of general applicability, takes the position that hydroelectric facilities are subject to the requirements of CWA § 316(b), 33 U.S.C. § 1326(b), and EPA's 2014 Rule.

The Proposed Permit would apply only to hydroelectric facilities that require an NPDES permit to discharge pollutants associated with the operation of hydroelectric facilities to waters of the United States in Idaho, and that use water to cool some of that equipment, where the amount of cooling water falls below the 2014 Rule's qualifying thresholds.[2] Region 10 asserts that those hydroelectric facilities must meet CWA § 316(b) requirements established by the Director on a case-by-case, BPJ basis under 40 C.F.R. § 125.90(b). Proposed Permit Fact Sheet at 22-23, 28. The Proposed Permit purports to reflect Region 10's BPJ about what CWIS technology is the best available "to minimize [the] adverse environmental effects of [CWIS]" at hydroelectric facilities and requires that the permit conditions reflecting those technologies be met within 180 days of the effective date of the permit. Proposed Permit Fact Sheet at 23.

The Region's proposal to apply CWA § 316(b), even on a BPJ case-by-case basis, to hydroelectric facilities is neither compelled by nor consistent with the CWA. And, as demonstrated in these comments, even if CWA § 316(b) were applicable, the Region's proposed

[2] *See* Proposed Permit Fact Sheet at 19. The 2014 Rule's stringent requirements apply only to facilities that are point sources requiring an NPDES permit, withdraw from a water of the United States, use CWIS with a design intake flow of greater than 2 million gallons per day ("MGD"), and use 25 percent or more of the water withdrawn exclusively for cooling purposes. 40 C.F.R. § 125.91(a).

BPJ requirements are arbitrary and capricious for several reasons. First, the Fact Sheet demonstrates that the Region borrowed from and relies on a rule that EPA expressly stated did not apply to hydroelectric facilities and that the Agency adopted without any consideration of the technical feasibility or cost of application of such requirements to hydroelectric facilities. Proposed Permit Fact Sheet at 28.

Second, the Region has provided no independent analysis or support for any of the proposed requirements. Indeed, for many of the conditions imposed, neither the Fact Sheet nor the Proposed Permit provide any meaningful indication of technology or methods the permit might be expected to employ, nor does the proposal provide any discussion of the technical feasibility, costs, benefits, or other relevant factors associated with those conditions. This deficiency is not limited to the requirements based on EPA's 2014 Rule. The Region has not provided, for example, any analysis of or support for the Proposed Permit's requirement that, to comply with the proposed BTA requirements established for CWIS, facilities must maintain screening technologies established in National Marine Fisheries Service ("NMFS") Northwest Region's Anadromous Salmonid Passage Facility Design guidelines, which were developed by NMFS for hydroelectric turbines, not cooling water diversion pipes.

The National Hydropower Association ("NHA") is the national non-profit trade association dedicated to promoting the growth of clean, affordable, U.S. hydropower. It seeks to secure hydropower's place as a renewable and reliable energy source that serves national environmental, energy, and economic policy objectives. NHA's membership includes more than 240 companies, from Fortune 500 corporations to family-owned small businesses. NHA members include public and investor-owned utilities, independent power producers, developers, equipment manufacturers and other service providers. In the United States, hydropower plants

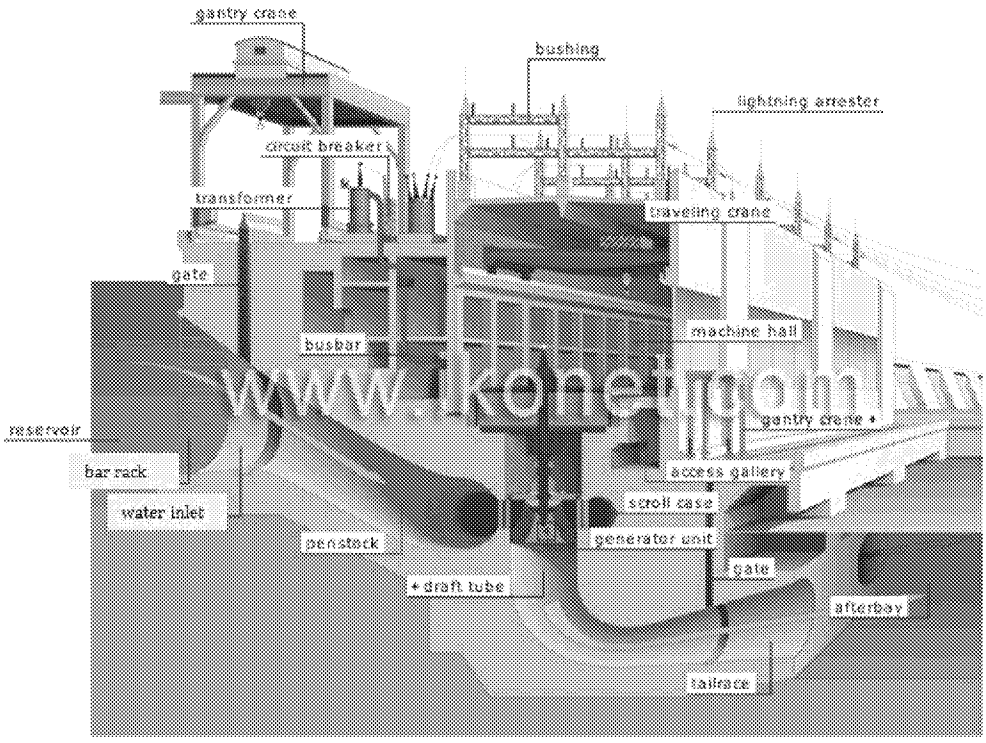
provide about 6 to 7 percent of the nation's total electric generation and pumped storage hydropower plants provide the vast majority of energy storage, approximately 97 percent. NHA's membership includes Idaho companies that will be directly affected by the Proposed Permit.

The Utility Water Act Group ("UWAG") is a voluntary, non-profit, unincorporated group of 146 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. UWAG members operate hydroelectric facilities, power plants, and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. One of UWAG's purposes is to participate on behalf of its members in EPA regulatory actions under the CWA and in litigation arising from those regulatory actions. UWAG's membership includes owners and operators of hydroelectric facilities that would be affected by the adoption and issuance of the Proposed Permit.

Hydroelectric facilities vary significantly in terms of design and configuration, especially when it comes to the pipes and structures that divert water for purposes of cooling. Generally, water diverted for cooling is primarily sourced from three locations within the hydroelectric facility: (1) the penstock – a closed conduit or pipe that conveys water from the reservoir to the turbine, (2) the turbine scroll case – a spiral-shaped steel structure distributing water flow through the wicket gates located just prior to the turbine, or (3) a water inlet port located on the face of the dam. There likely are exceptions to these locations, because each facility has a unique, location-specific design to take maximum advantage of the hydraulics of that location. An individual facility may use one design exclusively, or may use a combination of designs. After use for cooling, diverted water is transferred downstream primarily via these methods: (1)

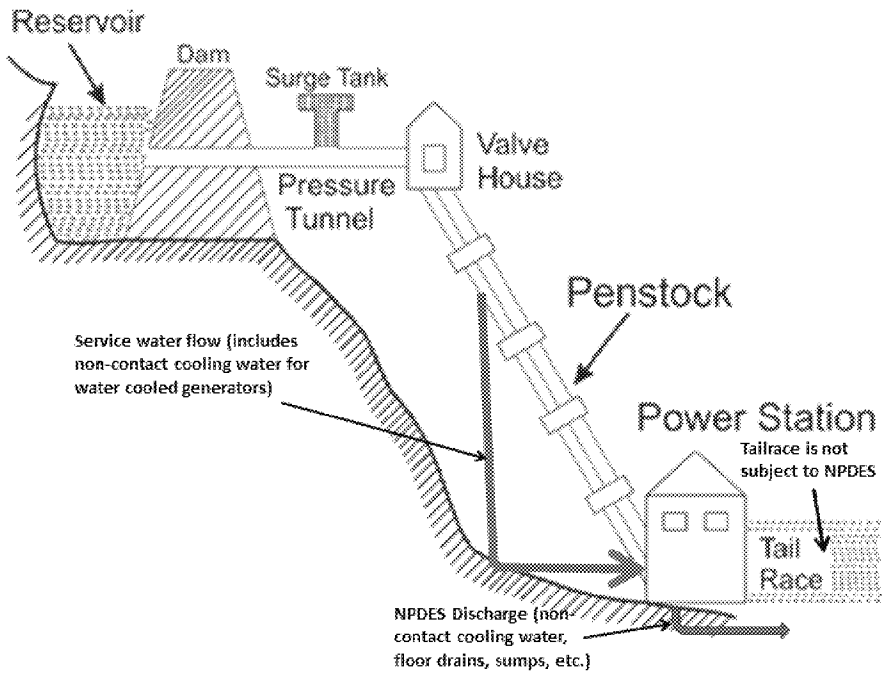
directed back to the penstock and re-used to generate electricity, (2) directed back to the scroll case (low head dams mainly) and re-used to generate electricity, (3) directed to the tailrace via the draft tube, or (4) direct transfer to the tailrace. The features of a typical hydroelectric facility are depicted in Figure 1, and an example of a facility diverting cooling water from the penstock is depicted in Figure 2.

Figure 1[3]



[3] The Visual Dictionary, Cross Section of a Hydroelectric Plant, www.ikonet.com.

Figure 2



Accordingly, hydroelectric generating facilities do not have CWISs in the conventional industrial context upon which the current § 316(b) regulations were developed. Hydroelectric facilities bring a wide variety of technical challenges associated with characterizing impingement and entrainment, and applying technologies that EPA considered in its 2014 rulemaking as available for on-shore facilities. This is evident in the 2014 Rule's definition of a CWIS. EPA's regulations define CWIS as "the total physical structure and any associated construction waterways used to withdraw cooling water from waters of the United States. The [CWIS] extends from the point at which water is first withdrawn from waters of the United States up to, and including the intake pumps." 40 C.F.R. § 125.92(f). The 2014 Rule envisions the use of pumps to actively *withdraw* cooling water from surface waters that are waters of the U.S., but this broad definition is inappropriate for hydroelectric facilities, which are diversion structures by design – impounding water and transporting/passing water along a contiguous waterway to

turn turbines used to generate electricity.[4] Relative to the total water transported through the facility, a very small amount of water is diverted for cooling. In general, cooling water accounts for less than 1% of the total water transported through the facility and in some cases less than 0.1%. For example, at the Keowee Hydro Station the cooling water is generally less than 0.01% of the total discharge flow.[5] As explained in further detail herein, given the wide range of configurations for hydroelectric facilities and different processes for diverting water for cooling, the best available technologies and sampling requirements imposed by EPA for steam electric power plants and manufacturing plants are not necessarily appropriate or practical for hydroelectric facilities. The Region 10 Proposed Permit fails to consider or account for these challenges.

II. EPA's Interpretation and Implementation of § 316(b) To Date

A. EPA's Prior Regulations Implementing § 316(b) Have Not Addressed Hydroelectric Facilities.

Section 316(b) provides:

> Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

33 U.S.C. § 1326(b).

EPA has implemented this provision by issuing regulations that establish BTA standards for intake structures that become binding for a particular facility only after the standards are incorporated into an NPDES permit for discharges from a regulated facility. At no point during

[4] Hydroelectric facilities do not have conventional CWIS and their configurations vary. These comments refer to the mechanisms that divert cooling water as intakes, pipes, or diversion structures.

[5] South Carolina NPDES Permit No. SC0000515, Fact Sheet and Permit Rationale at 18 (Mar. 16, 2011).

EPA's long history of implementing § 316(b) have EPA's regulatory actions addressed or evaluated the applicability of CWA § 316(b) to hydroelectric facilities.

In 1976, EPA issued its first § 316(b) rule, 41 Fed. Reg. 17,387 (Apr. 26, 1976), but the Fourth Circuit remanded it to EPA on procedural grounds. *Appalachian Power Co. v. Train*, 566 F.2d 451 (4th Cir. 1977). EPA's remaining rule and guidance instructed NPDES permit writers to make case-by-case determinations regarding BTA for CWIS at point sources subject to EPA standards established pursuant to §§ 301 or 306. *See* 40 C.F.R. § 401.14 ("The location, design, construction and capacity of cooling water intake structures of any point source for which a standard is established pursuant to section 301 or 306 of the Act shall reflect the best technology available for minimizing adverse environmental impact, in accordance with the provisions of part 402 of this chapter."); 33 U.S.C. § 1342(a)(1)(B).[6] By its terms, § 401.14 applies only to those point sources for which technology-based standards are established under §§ 301 and 306. By contrast, even where hydroelectric facilities require NPDES permits for discharges, the limits imposed are largely water quality-based.[7] Although § 401.14 has been in effect since 1976, generally, neither federal nor state NPDES permitting authorities read § 401.14 as applicable to hydroelectric facilities that are issued NPDES permits for minor equipment-related discharges.[8]

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[6] *See also* EPA, *Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) Public Law 92–500*, at 4 (1977) ("The environment-intake interactions in question are highly site-specific and the decision as to best technology available for intake design, location, construction, and capacity must be made on a case-by-case basis.").

[7] *See, e.g.*, Arkansas NPDES Permit No. AR0048755, Statement of Basis at 6-7 (Apr. 13, 2017); Arkansas NPDES Permit No. AR0048763, Statement of Basis at 7 (Sept. 4, 2013); West Virginia NPDES Permit No. WV0078859, App. A § I.12 (Aug. 9, 2016); South Carolina Department of Health and Environmental Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015).

[8] *See, e.g.*, NPDES General Permits for Hydroelectric Facilities in the States of Massachusetts and New Hampshire, Permit Nos. MAG360000, NHG360000 (Nov. 10, 2009); ADEM General Permit Rationale, Hydroelectric Facilities ALG360000 (Aug. 18, 2015); South Carolina Department of Health and Environmental Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015); North Carolina Department of Environment and Natural Resources, NPDES General Permit No. NCG50000 (Oct. 1, 2015). We are aware of one exception, discussed in note 38, infra.

Since 1976, EPA has issued a series of regulations implementing § 316(b) for new facilities, as well as existing steam electric plants and manufacturing facilities. The Phase I rule established national technology-based performance requirements for new facilities that withdraw greater than 2 MGD of surface water and use at least 25 percent of the water they withdraw for cooling purposes. 66 Fed. Reg. at 65,255 (Dec. 18, 2001). The Phase II rule set requirements for existing steam electric plants with flows greater than 50 MGD, 69 Fed. Reg. 41,576 (July 9, 2004), but certain aspects of the rule were invalidated by the U.S. Court of Appeals for the Second Circuit and later withdrawn.[9] The rules for lower flow steam electric plants and all manufacturing facilities (known as the Phase III rules) were also withdrawn. 71 Fed. Reg. 35,006 (June 16, 2006). In place of the Phase II and III rules, in 2014, EPA issued a single rule for existing facilities – the 2014 Existing Facilities Rule.[10]

During the development of the Phase I, II, and III rules, EPA never suggested that any of those rules would apply to hydroelectric facilities, whether or not the facilities use cooling water or need an NPDES permit. None of EPA's Information Collection Requests ("ICRs") were directed at hydroelectric facilities, nor did EPA use any other method to collect or consider information on cooling water diversion or use by hydroelectric facilities. Variations in the locations, design, and configurations of cooling water "intakes" unique to hydroelectric facilities were never contemplated in EPA's previous facility surveys or technology evaluations for promulgating § 316(b) regulations for new or existing power generating facilities. EPA did not consider whether hydroelectric facilities could feasibly monitor or otherwise assess entrainment or impingement mortality associated with cooling water diversion or whether those facilities

[9] *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007); 72 Fed. Reg. 37,107 (July 9, 2007).

[10] Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014).

could distinguish such mortality from mortality occurring by virtue of the passage of water through the turbines. Nor did EPA consider the availability, performance, or cost of technologies for reducing entrainment or impingement mortality that might be caused by hydroelectric facilities' cooling water "intakes," which often consist of one or more relatively small pipes diverting water from within or coming off of the penstock or draft tube of a hydroelectric facility or in some other location depending upon the broader facility design and operation.

The development of EPA's 2014 § 316(b) Rule was no different; EPA's ICR solicited no information from any hydroelectric facility.[11] As discussed below, EPA stated in the preamble to the proposed rule that water withdrawals for generation of electricity by hydroelectric facilities were not subject to the rule. *See* 76 Fed. Reg. 22,174, 22,190 (Apr. 20, 2011). As a result of this express and unambiguous statement, EPA received no comments regarding the potential applicability of CWA § 316(b) to hydroelectric facilities or addressing the potential impacts of applying the proposed technology requirements to hydroelectric facilities. Indeed, in the final 2014 Existing Facilities Rule, EPA estimated that a total of 1,065 facilities (544 electric generators and 521 manufacturers) would be subject to the Rule. 79 Fed. Reg. at 48,305. None of those facilities were hydroelectric power generators.[12] Thus, EPA never collected the necessary information to evaluate impacts of the Rule on hydroelectric facilities, even though some hydropower generators divert more than 2 MGD and use 25 percent or more of the diverted water for cooling purposes.

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[11] *See* Information Collection Request (ICR) for CWIS at Existing Facilities (Final Rule), OMB Control No. 2040-0257, EPA ICR No. 2060.07 (Aug. 2014).

[12] 2014 TDD at 4-24 ("From the universe of facilities with a steam electric prime mover and based on data collected from EPA's industry technical questionnaires and the compliance requirements for the final rule, EPA has identified 544 facilities to which the proposed rule is expected to apply.").

The 2014 Rule establishes requirements for existing facilities that: (1) have NPDES permits, (2) use one or more CWISs with a cumulative design intake flow ("DIF") of greater than 2 MGD to withdraw water from waters of the U.S., and (3) use 25 percent or more of the water withdrawn (on an actual intake flow basis) exclusively for cooling water purposes. 40 C.F.R. § 125.91(a). Facilities with CWISs that are subject to CWA § 316(b) that do not meet these criteria must meet § 316(b) requirements established by the permit writer on a case-by-case, BPJ basis. 40 C.F.R. § 125.90(b). EPA's final 2014 Existing Facilities Rule made no mention of hydroelectric facilities in the preamble or regulatory text.

B. The Proposed NPDES General Permit Inappropriately Seeks to Apply § 316(b) Requirements to Hydroelectric Facilities.

The Proposed Permit[13] would apply only to facilities below the 2 MGD and 25 percent cooling water threshold. Proposed Permit Fact Sheet at 28.[14] The Fact Sheet indicates that facilities above the 2 MGD and 25 percent cooling water threshold would have to obtain an individual NPDES permit, and (assuming the individual permit is a federal permit issued by Region 10) an individual § 401 water quality certification, and comply with the comprehensive requirements of the 316(b) Rule. *Id.* For facilities below the 2 MGD and 25 percent cooling

[13] The timing of the Proposed Permit coincides with the announcement that EPA has approved the application by the State of Idaho to administer and enforce the Idaho Pollutant Discharge Elimination System ("IPDES") program regulating discharges of pollutants into waters of the United States under its jurisdiction. 83 Fed. Reg. 27,769 (June 14, 2018). Under a Memorandum of Agreement ("MOA") between the Idaho Department of Environmental Quality and EPA Region 10, EPA will transfer the administration of specific program components to the State over a four-year period. Idaho will assume NPDES permitting and enforcement authority for general permits, such as the proposed general permit for wastewater discharges from hydroelectric generating facilities, by July 1, 2020.

[14] As discussed on page 31, the text of the Proposed Permit is inconsistent with the Fact Sheet and the 401 Water Quality Certification in its discussion of the thresholds facilities must meet to qualify for the permit (i.e., whether facilities above the 2 MGD *and* 25 percent cooling water threshold are ineligible or whether facilities that meet either the 2 MGD *or* 25 percent cooling water thresholds are ineligible). For purposes of these comments, we are assuming that Region 10 intended that facilities that are ineligible for coverage under the Proposed Permit are those facilities that use greater than 2 MGD *and* use 25 percent or more of the water for cooling purposes.

water threshold, the Proposed Permit would set BTA requirements that must be implemented within 180 days of the effective date of the permit, including, for example:

- manage tailrace operations to prevent fish access to the draft tube areas;
- cease or reduce the intake of cooling water whenever withdrawal of source water is not necessary, *i.e.*, during equipment testing or maintenance activities;
- return all observed live impinged fish to the source water to the extent practicable;
- conduct weekly monitoring to identify what species are impinged;
- maintain a physical screening or exclusion technology consistent with NMFS Northwest Region's Anadromous Salmonid Passage Facility Design guidelines; and
- properly operate and maintain CWIS, including any existing technologies to minimize impingement and entrainment.[15]

In addition, permittees also would have to prepare a report to be submitted to Region 10 at least 180 days prior to permit expiration that would include extensive information regarding the CWIS and source waterbody, including, for example:

- if the combined design capacity of all CWISs is greater than 1 MGD, the measures to be taken by the facility to maintain a daily maximum surface water withdrawal of 1 MGD;
- maximum monthly average intake of the CWIS during the previous five years;
- whether the facility withdraws cooling water at a rate commensurate with a closed-cycle cooling system;
- maximum through-screen design intake velocity;
- detailed description of screening and exclusion technology employed to prevent impingement and entrainment at the CWIS; and
- report of the prior five-year results from the required impingement and entrainment monitoring program.[16]

The Fact Sheet states, "EPA will use this information to assess the potential for impingement and entrainment at the CWIS, evaluate the appropriateness of any proposed

[15] Proposed Permit, § IV.C.2.

[16] Proposed Permit, § IV.C.3.

technologies or mitigation measures, and determine any additional requirements to place on the facility's CWIS in the next permit cycle." Proposed Permit Fact Sheet at 28-29. The Idaho Department of Environmental Quality ("IDEQ") has certified that, if the permittee complies with the terms and conditions of the Proposed Permit and the conditions set forth in the water quality certification, "there is reasonable assurance" the covered hydroelectric facilities' discharges "will comply with the applicable requirements" of the CWA and Idaho Water Quality Standards.[17]

The Region provides no analysis or support for applying § 316(b) requirements to hydroelectric facilities. The Fact Sheet demonstrates that the Region relied on and drew heavily from EPA's 2014 Rule in establishing CWIS-related requirements in the Proposed Permit. *See* Proposed Permit Fact Sheet at 28. But nowhere in the Proposed Permit or Fact Sheet does the Region provide any support or independent analysis for the measures it proposes to require for hydroelectric facilities.

III. CWA § 316(b) Does Not Apply to Hydroelectric Facilities.

A. Hydroelectric Generation Facilities Are Not Subject to CWA § 316(b).

By its terms, § 316(b) applies only where EPA establishes standards under §§ 301 and 306 for point sources. Unlike the other facilities to which EPA has applied § 316(b), EPA has not established such technology-based limitations and standards for hydroelectric facilities, nor would it be reasonable to do so given the *de minimis* nature of their discharges. As the United States Supreme Court has recognized, absent clear direction from Congress, courts will view (and agencies should view) with skepticism statutory interpretations that extraordinarily expand regulatory jurisdiction. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). Interpreting CWA § 316(b) to apply to hydroelectric generation facilities would be a significant

[17] IDEQ Draft § 401 Water Quality Certification for NPDES Permit Number IDG360000 (Mar. 29, 2018).

expansion of EPA's regulatory jurisdiction and would duplicate other federal and state requirements specifically designed to address these environmental impacts.

The limited legislative history for § 316(b) indicates that Congress did not intend for § 316(b) to apply to hydroelectric facilities. From November 1971 to October 1972, Congress considered various bills that eventually would become the CWA. On September 28, 1972, the conference committee substantially amended § 316, modifying that provision to insert for the first time a provision addressing cooling water intakes structures, and submitted its report for approval by both the House and Senate.[18] During the House of Representatives consideration of the conference report, Rep. Donald Clausen (R-CA1) made the following statement in support:

> Section 316 was originally included in the House-passed water pollution control bill because of the belief that the arguments which justified a basic technological approach to water quality control did not apply in the same manner to the discharges of heat.... [S]team-electric generating plants are the major source of the discharges of heat.... Section 316(b) requires the location, design, construction, and capacity of cooling water intake structures *of steam-electric generating plants* to reflect the best technology available for minimizing any adverse environmental impact.[19]

Rep. Clausen's statement indicates that Congress intended § 316(b) to apply to steam electric generating plants, not hydroelectric generating facilities that harness the power of falling or fast-moving water to drive turbines to produce electricity.[20] In contrast, steam electric power plants heat water into steam that drives the electric-generating turbines, typically requiring considerably more cooling water to safely operate the facility. It is these facilities that were Congress' focus when it promulgated CWA § 316(b).

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[18] *See* H.R. Rep. No. 92-1465, at 68, 137 (Sept. 28, 1972).

[19] House Consideration of the Report of the Conference Committee (Oct. 4, 1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 262–64 (1973) (statement of Rep. Clausen) (emphasis added).

[20] We recognize that some U.S. Courts of Appeals have held that § 316(b) applies to other industrial facilities that use cooling water beyond steam electric plants (*e.g.*, iron and steel). *See, e.g., Appalachian Power Co. v. Train*, 566 F.2d 451, 457-58 (4th Cir. 1977). But those decisions did not consider whether all facilities that must obtain an NPDES permit are subject to § 316(b).

In promulgating CWA § 316(b), Congress would have understood, as discussed in more detail below, that other statutes and regulations governed consideration of environmental impacts from water diversion structures. For example, Congress would have been well aware that the Federal Power Act ("FPA") licensing process for hydroelectric facilities requires evaluation of environmental impacts and conditions to protect and mitigate impacts to fish and wildlife-related habitat. Congress gave no indication that it intended such facilities to be subject to additional requirements under CWA § 316(b), nor would such requirements have made sense in light of the other mechanisms in place under the FPA. There is no evidence that Congress intended CWA § 316(b) to apply to hydroelectric facilities, and, indeed, the limited legislative history for that provision indicates that Congress intended § 316(b) to address adverse environmental impacts associated with industrial facilities, such as steam electric generating facilities, for which the statute requires EPA to establish nationally applicable effluent limitations guidelines and new source performance standards. There is no basis in the statute for EPA's new interpretation that § 316(b) can apply to hydroelectric facilities.

B. Establishing § 316(b) Requirements for CWISs at Hydroelectric Facilities Would Conflict With and Duplicate Other Federal and State Requirements Already in Place.

The statutory scheme Congress established under the FPA, and other federal statutes, demonstrates Congress' intent that the Federal Energy Regulatory Commission ("FERC") address, through the FERC hydropower licensing process, all issues relating to the use of water by non-federal hydroelectric facilities, including any water quality issues raised by a State CWA § 401 certification.[21]

[21] This section focuses on hydroelectric projects that require FERC authorization because those are the most common facilities for our members. Certain non-federal hydroelectric facilities, such as small projects (5 MW or less) or projects conducted on an existing conduit (*e.g.*, irrigation canal), do not require FERC licensing because those projects would result in minor environmental effects (*e.g.*, projects that involve little change to water flow and

The comprehensive development standard of FPA § 10(a)(1) requires that licensed hydroelectric projects be best adapted to a comprehensive plan for improving or developing a waterway, including, among other uses, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat). 16 U.S.C. § 803(a)(1). Section 10(a)(1) grants FERC the authority to require the modification of any project and of the plans and specifications of the project works before approval. Thus, to the extent that participating resource agencies, which are actively involved in the licensing process, identify during licensing significant issues relating to impacts from diversion and use of cooling water at hydroelectric facilities, those impacts would be considered by FERC in ensuring that the project will be best adapted to a comprehensive plan.

Section 10(j) of the FPA provides for the full participation of federal and state fish and wildlife agencies in recommending conditions for the protection, mitigation, and enhancement of fish and wildlife resources affected by the development, operation, and management of the hydroelectric project.[22] Such conditions are based on recommendations received pursuant to the Fish and Wildlife Coordination Act from NMFS, the U.S. Fish and Wildlife Service ("FWS"), and state fish and wildlife agencies. As part of the application for a hydroelectric license (or relicense), applicants must submit an environmental report to FERC describing the fish and wildlife that occur within the vicinity of the project and downstream areas affected by the

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use and are unlikely to affect threatened and endangered species), but they are still subject to a similar process and subject to mandatory terms and conditions set by federal and state fish and wildlife agencies and by the Commission. 18 C.F.R. § 4.30. Other federal, non-FERC regulated hydroelectric facilities are generally authorized by Congress and owned by the U.S. Bureau of Reclamation or the U.S. Army Corps of Engineers and in some circumstances must comply with National Environmental Policy Act provisions regarding impacts to aquatic resources associated with operational changes, as well as formally consult with the U.S. Fish and Wildlife Service where federally threatened and endangered species are potentially impacted.

[22] 16 U.S.C. § 803(j)(1).

project, and must identify any federally listed threatened or endangered species.[23] The same report also must describe any measures recommended by consulting fish and wildlife agencies for mitigating such impacts and protecting fish and wildlife.[24]

Additional requirements to evaluate potential impacts to aquatic species exist under the Endangered Species Act ("ESA") and the National Environmental Policy Act ("NEPA"). Pursuant to ESA § 7 and FERC's corresponding regulations, FERC has an obligation to ensure that any project it authorizes is not likely to jeopardize the continued existence of any federally listed endangered or threatened species.[25] To satisfy this requirement, FERC directs project sponsors to engage in informal consultation with NMFS and/or FWS to determine whether the project will impact a federally listed species.[26] Unless NMFS or FWS concludes that the proposed hydroelectric facility is not likely to adversely affect federally listed species, the project sponsor must prepare a Biological Assessment containing the results of detailed surveys, potential impacts, and proposed mitigation to eliminate or minimize such impacts.[27] Where the consulting agency concludes that the project will result in the "incidental take"[28] of listed species, NMFS or FWS will prepare a Biological Opinion that may include reasonable and prudent measures to avoid jeopardy and must include a statement specifying the impact (*i.e.*, the amount or extent of incidental take), and reasonable and prudent measures considered necessary or appropriate to minimize the take of listed species.[29] Through this process, FERC will

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[23] 18 C.F.R. §§ 4.51(f), 4.41(f).

[24] *Id.*

[25] 16 U.S.C. § 1536.

[26] 18 C.F.R. § 380.13.

[27] *See* 18 C.F.R. § 380.13(b).

[28] "Incidental take" refers to "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity." 50 C.F.R. § 402.02.

[29] *See* 16 U.S.C. § 1536(b)(4); *see also* 50 C.F.R. § 402.15(i).

determine, in consultation with federal fish and wildlife agencies, which conservation and mitigation measures should be implemented to minimize impacts. In other words, the ESA process frequently results in the imposition of measures to protect listed species that might be impacted by operations of hydroelectric facilities, including the diversion of cooling water.

NEPA review requires the development by FERC of a Finding of No Significant Impact ("FONSI"), an Environmental Assessment ("EA"), or an Environmental Impact Statement ("EIS") for a project. Entrainment, impingement, and other impacts on fish and wildlife are analyzed in these environmental documents. For example, within the EA for a hydroelectric project in Arkansas, FERC concluded that "[b]ased upon [Arkansas Game and Fish Commission] observations, current levels of turbine entrainment and mortality of fish is [sic] not considered to be a significant issue at these projects."[30] Likewise, comprehensive entrainment studies were developed as part of the application process for the Catawba-Wateree and Yadkin-Pee Dee, hydroelectric projects spanning the Carolinas. The EIS for the Catawba-Wateree project found that "entrainment does not appear to adversely affect survival and growth of young of target sport and forage species populations,"[31] and the EIS for the Yadkin-Pee Dee project found that there is "no indication that entrainment is having significant adverse effects on resident fish populations, because project reservoirs and riverine reaches support robust fish populations and an excellent sport fishery."[32] Similarly, for the Smith Mountain Hydroelectric Plant, a pumped storage facility in Virginia, an entrainment study qualitatively evaluated entrainment for selected species based on reservoir and turbine intake characteristics, water

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[30] FERC, Environmental Assessment for Hydropower License, Project No. 271-062, at 66 (Dec. 2001).

[31] FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2232, at 178 (July 2009).

[32] FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2206, at 138 (Apr. 2008).

velocity and swim speed data, and life history characteristics.[33] FERC concluded in the EIS for the project that the "loss of individual fish from entrainment and mortality is not expected to result in any substantial effects to the fishery at the Project."[34] The analyses above address entrainment associated with all water passing through the projects, including the enormous amounts of water that go through the turbines for electricity generation. While these studies generally do not focus on entrainment specific to the small pipes and other structures – often within or off of the penstocks – that various hydroelectric facilities use to divert water for service water and cooling purposes, withdrawals and entrainment impacts from these cooling water diversions would be exceptionally smaller. In addition, FERC frequently addresses the issue of fish impingement and entrainment by requiring licensees to screen their intakes to prevent or minimize fish from entering the penstock, which can eliminate or reduce the possibility of impingement or entrainment during the diversion of water from the penstock for cooling purposes.

Furthermore, CWA § 401 provides states broad authority to impose conditions as part of state-issued water quality certificates in the context of the licensing and relicensing of projects. FERC may not issue a license unless the state has either issued or waived the water quality certificate. States have used this authority to impose conditions related to fisheries, aesthetics, recreation, and more.[35] Such conditions are considered "mandatory," meaning that FERC has no discretion but to include them in a license.

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[33] *See* FERC, Final Environmental Impact Statement for Hydropower License, Project No. 2210, at 119-126 (Aug. 2009).

[34] *Id.* at 126.

[35] *See, e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) (holding FERC-licensed dams must comply with state certification that required operator to maintain stream flow and allow passage for certain fish and eels).

In accordance with the authorities described above, fish and wildlife agencies often recommend protection, mitigation, and enhancement measures to offset any known impacts of hydroelectric facilities for aquatic species. In some cases, FERC license conditions may go further than the 2014 Rule would to minimize adverse environmental impacts associated with hydroelectric operations because they can include habitat restoration which, although not allowed as BTA for steam electric and manufacturing facilities captured under the Existing Facilities Rule, serves to provide habitat for individual species, life stages (such as spawning and rearing of young), or entire communities of aquatic organisms affected by hydroelectric operations. Thus, the FERC licensing process already provides for measures to minimize adverse environmental impacts of hydroelectric operations and may, at times, be more stringent than § 316(b) requirements. Any imposition of § 316(b) requirements, either through application of the 2014 Rule or a case-by-case BPJ determination, would be duplicative of existing federal and state requirements already in place. As the Alabama Department of Environmental Management ("ADEM") has recognized, "[t]he purpose of 316(b) of the [CWA] is to reduce mortality to fish and other aquatic organisms impacted by cooling water intake structures," but, for hydroelectric facilities, "the impacts to aquatic organisms are already addressed" and "have been extensively studied under the [NEPA] and [FERC] regulatory frameworks and subsequently granted 401 certifications."[36]

IV. EPA's 2014 Rule for Existing Facilities Did Not Consider Hydroelectric Facilities.

Even if CWA § 316(b) were applicable to hydroelectric facilities, which it is not, the Region's proposed BPJ requirements are arbitrary and capricious because the Region borrowed from and relies on a rule that EPA expressly stated did not apply to hydroelectric facilities and

[36] *See* ADEM General Permit Rationale, Hydroelectric Facilities ALG360000, at 3 (Aug. 18, 2015).

that the Agency adopted without any consideration of the technical feasibility or cost of application to hydroelectric facilities.

A. EPA Has Never Provided Notice or an Opportunity to Comment on the Applicability of § 316(b) Requirements to Hydroelectric Facilities.

Under the APA, 5 U.S.C. § 553(b)(3), an agency must publish in the *Federal Register* a notice of proposed rulemaking, which "shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved." After the notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). The APA's notice-and-comment mandate is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of America v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). These procedures "ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994).

To ensure regulated entities have fair notice, "the final rule the agency adopts must be a 'logical outgrowth' of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). Under this principle, the law asks "whether the affected party 'should have anticipated' the agency's final course in light of the initial notice." *Covad Commc'ns. Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (citation omitted). While a final rule need not be an exact replica of the proposed rule, "if the final rule deviates too sharply from the proposal,

affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

As explained above, prior to the implementation of the 2014 Rule, there had never been any indication from EPA or Congress that CWA § 316(b) could apply to hydroelectric facilities. Moreover, there was no way to anticipate from the proposed Existing Facilities Rule that EPA would apply the technology-based standards to hydroelectric facilities. Hydroelectric facilities had no notice that those facilities could be subject to new NPDES requirements as a result of the 2014 rulemaking, nor were they provided an opportunity to comment on the many ways in which technologies that EPA evaluated for steam electric power and manufacturing plants cannot be considered BTA for hydroelectric facilities. In the preamble to the proposed rule for existing facilities, EPA explicitly stated that withdrawals from hydroelectric facilities were not meant to be addressed by the Existing Facilities Rule:

> Given the diversity of industrial processes across the U.S., there are many other industrial uses of water not intended to be addressed by today's proposed rule . . . Warming water at liquefied natural gas terminals, and *hydro-electric plant withdrawals for electricity generation are not cooling water uses and are not addressed by today's proposal* . . . .

76 Fed. Reg. at 22,190 (emphasis added).

In light of EPA's history of *not* applying CWA § 316(b) to hydroelectric facilities and because EPA's explicit statements confirmed that hydroelectric facilities would not be covered by the Existing Facilities Rule, private and public entities that own or operate hydroelectric facilities did not provide comments to address the potential impacts of the Existing Facilities Rule's proposed requirements.[37] Applying the Existing Facilities Rule to hydroelectric facilities, therefore, cannot be a logical outgrowth of the proposed rule. Thus, any attempt now by EPA to

[37] There is no reference to hydroelectric facilities in EPA's 467-page response to comments document. Response to Comments Document for the Final 316(b) Existing Facilities Rule (May 19, 2014) (EPA-HQ-OW-2008-0667-3679).

apply the Rule's requirements to hydroelectric facilities, which has been done only on rare occasions through post hoc determinations for particular facilities[38] and now in the Proposed Permit, is contrary to the APA's requirements for fair notice and opportunity for comment.

B. EPA Did Not Consider Technologies for Hydroelectric Facilities or Evaluate the Potential Impacts of Applying the Rule's BTA Standards to Hydroelectric Facilities.

EPA's final 2014 Rule and preamble provide no discussion of the applicability of § 316(b) or the Rule to hydroelectric facilities. In fact, the administrative record for the 2014 Rule is replete with indications that EPA did not consider impacts to hydroelectric facilities when evaluating potential technologies or the associated costs and benefits. For example, in the Economic Analysis for the final 2014 Rule, EPA stated that "[t]he final rule is only relevant for power generators that use substantial amounts of cooling water, and …[o]nly prime movers with a *steam-electric generating cycle* use large enough amounts of cooling water to be subject to the final rule."[39] The analysis goes on to describe steam electric facilities as those generating units

[38] In one of the few instances where EPA has asserted that § 316(b) and the 2014 Rule apply to hydroelectric facilities, it is clear that EPA's determination was made behind the scenes, well after the 2014 Rule was promulgated, and without a notice-and-comment rulemaking that evaluated the potential implications of such a determination. The 2016 NPDES Permit Fact Sheet for the Smith Mountain Hydroelectric Plant in Virginia stated, "Significant discussion was held during this reissuance regarding the applicability of CWA section 316(b). [The applicant's] position is that hydropower stations are not subject to section 316(b). However, after consultation with EPA, a determination was made that the facility is subject to CWA 316(b) and the [Existing Facilities] Rule. The determination was that § 316(b) 'applies' to hydropower facilities if waters of the U.S. are withdrawn and used for cooling purposes." VPDES Permit Program Fact Sheet, Permit No. VA0088765, at ¶ 30 (June 13, 2016). Other states that have considered the issue have determined that § 316(b) does not apply to hydroelectric facilities, *see, e.g.,* ADEM General Permit Rationale, Hydroelectric Facilities ALG360000 (Aug. 18, 2015) (ADEM agrees that the § 316(b) rule is "not applicable" to hydroelectric facilities), or have continued to issue NPDES permits for hydroelectric facilities without § 316(b) requirements, *see, e.g.,* South Carolina Department of Health and Environmental Control, NPDES General Permit for Hydroelectric Generating Facilities, Permit No. SCG360000 (May 15, 2015); North Carolina Department of Environment and Natural Resources, NPDES General Permit No. NCG50000 (Oct. 1, 2015).

[39] Economic Analysis for the Final 316(b) Existing Facilities Rule at 2A-4 (May 2014) (emphasis added) ("2014 Economic Analysis").

that are fueled by "coal, gas, oil, waste, nuclear, geothermal, and solar steam."[40] EPA does not include hydroelectric facilities in its analysis of the economic impact of the Rule on electric generation units, nor does EPA analyze the economic impact of the rule on hydroelectric facilities, in particular.[41] Likewise, in the Technical Development Document for the 2014 Rule, EPA includes the following exhibit that provides the estimated number of facilities that would be subject to the 2014 Rule by fuel type and prime mover category, but the table does not include hydroelectric facilities:

Exhibit 4-26. 316(b) electric power facilities by plant type and prime mover

Plant type[a]	Prime mover	Number of 316(b) electric generators[b,c]
Coal steam	Steam turbine	342
Gas	Steam turbine	73
Nuclear	Steam turbine	56
Oil	Steam turbine	29
Other steam	Steam turbine	25
Total steam	Steam turbine	525
Combined cycle	Combined cycle	33
Total		559

[a] Facilities are listed as steam electric if they have at least one steam electric generating unit.
[b] Facility counts are weighted estimates generated using the original 316(b) survey weights.
[c] Individual values do not sum to reported total due to rounding as the result the application of statistical weights.
Sources: U.S. EPA, 2000; U.S. DOE, 2007 (GenY07); U.S. EPA Analysis, 2010

2014 TDD Exhibit 4-26.

Similarly, EPA's benefit analyses did not consider hydroelectric facilities. To evaluate the benefits of the 2014 Rule's requirements, EPA extrapolated data from 98 model facilities based on information EPA received in the 2000 ICR.[42] In its 2000 ICR, however, EPA did not request information from any hydroelectric facilities. EPA ultimately narrowed its research

[40] *Id.*; *see also* Technical Development Document for Final Section 316(b) Existing Facilities Rule at 4-23 (May 19, 2014) ("2014 TDD") ("Only prime movers with a steam-electric generating cycle use large enough amounts of cooling water to fall under the scope of the proposed rule.").

[41] In fact, the only discussion of hydroelectric facilities in EPA's Economic Analysis is a general description of hydroelectric facilities' contribution to electricity generation. *See* 2014 Economic Analysis at 2A-3.

[42] *See* Benefits Analysis for the Final Section 316(b) Existing Facilities Rule at 3-5 (May 2014).

activities to focus on traditional utilities, nonutility power producers, and four other industrial categories that utilize large quantities of cooling water. "Traditional utilities and nonutility power producers that use cooling water were further limited to those plants that generate electricity by means of steam as the thermodynamic medium (steam electric) because they are associated with large cooling water needs."[43] Therefore, hydroelectric facilities, which do not generate electricity through the use of steam, were excluded from EPA's original data request, which was later used to support EPA's analysis of the Existing Facility Rule's benefits.

In fact, EPA concluded that "[u]nits with water turbines, or 'hydroelectric units,'... do not use a steam loop and do not use cooling water ...."[44] As Region 10 now appears to understand, hydroelectric facilities occasionally do use cooling water, although they do so in small amounts, and their use of cooling water certainly was not the focus of the 2014 Rule.

If EPA had actually considered the technical feasibility and cost for application requirements and any technology and associated monitoring requirements for hydroelectric facilities, it would have understood that what is BTA for steam electric power and manufacturing plants is not necessarily BTA for hydroelectric facilities. EPA previously has recognized that a different BTA may be appropriate for other types of facilities with CWISs. For example, EPA determined that, for existing offshore oil and gas platforms, no retrofit technology was BTA. EPA studied the facilities and "could not identify any technologies (beyond the protective screens already in use) that are technically feasible for reducing impingement or entrainment in such existing facilities." 79 Fed. Reg. at 48,310. As discussed in more detail in Section IV.B below, there are similar challenges for hydroelectric facilities.

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[43] Information Collection Request, Detailed Industry Questionnaires: Phase II Cooling Water Intake Structures & Watershed Case Study Short Questionnaire at 4 (Aug. 18, 1999).

[44] 2014 TDD at 4-22.

EPA cannot impose § 316(b) requirements on hydroelectric facilities without engaging in proper notice-and-comment rulemaking that evaluates the availability and feasibility of potential technologies for hydroelectric facilities. Region 10's Proposed Permit and Fact Sheet do not fulfill this requirement. Accordingly, it is unlawful for Region 10 to impose on hydroelectric facilities CWA § 316(b) requirements – whether they are based on BPJ determinations or the 2014 Rule – without following the necessary procedures or conducting this type of evaluation.

V. Even if § 316(b) Did Apply to Hydroelectric Facilities, Which it Does Not, the Requirements of the 2014 Rule Are Not Appropriate for Such Facilities, Which Are Fundamentally Different From Facilities Covered by the Rule.

The requirements that EPA established in the 2014 Rule are not appropriate for hydroelectric facilities, which are fundamentally different from the steam electric power and manufacturing plants EPA considered in that rulemaking.

As discussed above, EPA did not consider hydroelectric facilities in establishing BTA in its 2014 Rule. EPA explained in the preamble to the 2014 Rule that, to establish BTA for the facilities covered by the Rule, EPA considered: "the availability and feasibility of various technologies," "costs associated with these technologies," the technologies' economic impacts, "effectiveness of these technologies in reducing impingement mortality and entrainment," and additional factors, such as "location, age, size, and type of facility." 79 Fed. Reg. at 48,328. For this analysis, EPA made a number of assumptions based on data and information from steam electric power plants and manufacturing plants that do not take into account technology costs or feasibility for hydroelectric facilities.[45]

[45] For example, in evaluating impingement data and performance standards, EPA relied on 26 impingement mortality data sets at 17 facilities, none of which included hydroelectric facilities. 79 Fed. Reg. at 48,323; 2014 TDD Exhibit 11-3. As another example, in the final rule, EPA adjusted its assumptions for costs of modified traveling screens with fish returns in response to feedback that its proposal had underestimated those costs. 79 Fed. Reg. at 48,324. The adjustments EPA made in its evaluation of technology costs included: to correct its misplaced assumption that modified traveling screens were available at most facilities, EPA assigned higher cost technologies (*e.g.*, larger intakes, wedgewire screens with through-screen design velocities of 0.5 fps) for intakes that use passive

The assumptions that EPA made for the facilities it considered in its 2014 Rule do not necessarily apply for hydroelectric facilities. There are numerous different configurations for hydroelectric facilities and, in particular, their pipes and structures that divert cooling water. Nearly every facility has unique, location-specific design attributes to take maximum advantage of the hydraulics of that unique physical location. For example, some hydroelectric facilities have a hole bored through the penstock in which a perforated flange is used to attach a small pipe used to gravity feed service and cooling water equipment. Some hydroelectric facilities have pipes that come off the scroll case. Others have separate pipes that come off the face of the dam. For these three configurations, water that is gravity- or pressure-induced feeds through the pipe to cool and service the equipment. Other facilities have separate intake pump houses upstream of the powerhouse. For those facilities, there is a distinct and separate intake used for service water and cooling purposes. Pumped storage facilities pump water from lower reservoirs to higher elevation reservoirs during times of low electric demand and then release water from the upper reservoir to drive turbines during periods of high electric demand. In one pumped storage facility, cooling water is drawn from the cavity between the inner and outer walls of the power house, while service water is drawn from a single intake at the tailrace of the plant.

Given the wide range of configurations for hydroelectric facilities and different processes for diverting water for cooling, the technologies that EPA found to be the best available technologies and sampling requirements for steam electric power plants and manufacturing plants are not necessarily appropriate or practical for hydroelectric facilities.

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screens; EPA increased capital costs for the fish return component and included additional costs for those with particularly difficult circumstances, such as very long intake canals and submerged offshore intakes. *Id.*; 2014 TDD at 8-2 to 8-6 (explaining EPA's model facility approach and modifications to the cost tool). EPA did not consider application of the technology to hydropower facilities.

For example, at many hydroelectric facilities, conducting impingement or entrainment sampling at the pipe or structure taking in cooling water would be very difficult, or even unsafe, due to turbulence. Sampling equipment may not be able to withstand water flows and forces and could break away, potentially damaging the facility.

In addition, many of the impingement technology options that are established as BTA in the 2014 Rule would not be feasible at most hydroelectric facilities. For example, one of the impingement options is to use a maximum 0.5 feet per second through-screen design velocity, 40 C.F.R. § 125.94(c)(2), but for many hydroelectric facilities, the only way to retrofit an intake pipe within the penstock to meet that through-screen design velocity would be to increase the size of the intake opening, which in some cases would require dam reconstruction and could actually increase entrainment because of the increase in the volume of water passing through the intake. Similarly, another impingement option is to operate an intake structure with a maximum through-screen velocity of 0.5 feet per second, § 125.94(c)(3), but it would be impossible to measure the actual velocity at the intake for most hydroelectric facilities because the magnitude and force of the water is so great as it is going through the penstock that no monitoring equipment could be located near the intake. Nor would it be feasible to install modified traveling screens, § 125.94(c)(5), on the small pipes that are used by many hydroelectric facilities to take in cooling water. At least three of the impingement options, §§ 125.94(c)(5)-(7), require an impingement technology performance optimization study, which would be very difficult, if not impossible, for many hydroelectric facilities that would not be able to conduct impingement sampling at the intake.

Indeed, the 2014 Rule's requirements would not be necessary in most cases because the rates of impingement and entrainment would be so low that additional controls would not be

warranted. Some hydroelectric facilities have in place screens to prevent debris of a certain size from entering the penstock (and therefore the cooling water pipe), and at many facilities, the water passes through a strainer before being used for cooling purposes. Some of these strainers are backwashed to a plant sump. In our members' experience, fish are rarely (if ever) observed in strainer baskets or in backwash to the plant sump. Moreover, for many hydroelectric facilities, due to the high velocity and volume of water passing through the penstock and by the entrance to the intake, the rates of impingement would be so low that additional impingement controls would be useless. The same is true for entrainment at many of these facilities. For hydroelectric facilities, the *de minimis* exception for impingement established in the 2014 Rule, 40 C.F.R. § 125.94(c)(11), would be applicable more often than not. And the fact that there is not a *de minimis* exception for entrainment in the 2014 Rule would create issues for many hydroelectric facilities that would have no way of further minimizing the already very minor rates of entrainment.

EPA clearly did not consider hydroelectric facilities when it was establishing the requirements under the 2014 Rule. As explained above, such requirements are not appropriate or feasible for hydroelectric facilities, which are fundamentally different from facilities covered by the 2014 Rule.

VI. The § 316(b) Measures Required in the Proposed General Permit Are Inappropriate for Hydroelectric Facilities.

Even if § 316(b) applied to hydroelectric facilities, which it does not, the measures that Region 10 proposes as BTA in the Proposed Permit are inappropriate for the hydroelectric facilities to which the Proposed Permit, if finalized, would apply. As Region 10 acknowledges,

each generating facility is unique in its location, physical layout, and operational pattern.[46] The documentation Region 10 has supplied provides no information on the specific attributes of the "intake structures" used to supply cooling water used by the hydroelectric facilities to which any final permit would apply. Indeed, the Fact Sheet reflects no attempt to characterize or consider the wide range of variation among existing cooling water intakes at hydroelectric facilities. That variation is important because site-specific factors may make it difficult or impossible for many facilities to comply with some or all of the proposed requirements.

The Region also made no effort to assess whether those intakes, as currently configured and operated, are causing any meaningful environmental impacts not already minimized in the licensing and NEPA review process. It is difficult to understand how Region 10 could have exercised its BPJ that the intake of cooling water at hydroelectric facilities requires further control without first collecting at least some information from which to evaluate whether the diversion of relatively small amounts of water that otherwise would flow through the facility were likely to cause any meaningful incremental environmental impacts. Even if it were appropriate to apply § 316(b) to these facilities (which NHA and UWAG believe it is not), the exercise of BPJ for existing facilities requires at least some understanding of the location, design, construction, and capacity of the "intake structures" involved and the environmental impacts occurring. Region 10 put the cart before the horse, imposing new "BTA" requirements without first evaluating the attributes of the facilities in question and determining whether or not they already have minimized adverse environmental impacts.

Region 10 also failed to identify the technologies, measures, procedures, and methods that it anticipates facilities would use to meet the requirements imposed by the permit. Nor did

[46] EPA Region 10, Biological Evaluation of the NPDES General Permit for Hydroelectric Facilities Within the State of Idaho, Permit Number IDG360000, at 8 (Feb. 2018).

Region 10 consider how the BTA requirements it seeks to impose may overlap or conflict with FERC license conditions. As discussed below, many of the proposed requirements dictate an outcome (like returning fish to the waterbody or managing tailrace operations to prevent fish access to draft tube areas) without any discussion of what technology or other measures the Region expects the facility to use to accomplish that outcome. The record is equally devoid of any assessment of the feasibility and costs of using whatever technologies, procedures, or methods might be needed to satisfy those requirements, or the level of performance or environmental benefits likely to be achieved. Indeed, some of the measures Region 10 has proposed could be read to apply to hydroelectric facilities as a whole, including parts of the facility (e.g. tailrace) that are not part of the process for diverting cooling water.

The availability and cost of specific technologies and measures, the impact of those costs on affected facilities, and the environmental benefits of requirements based on those technologies are all important factors that EPA acknowledged it needed to consider before establishing its nationally applicable § 316(b) regulations for facilities withdrawing cooling water above the applicable thresholds. EPA also considered feasibility, cost, and benefits in establishing permit application requirements, including those dealing with biological monitoring and other data collection and analysis, reporting, and recordkeeping. Based on its consideration of those factors, EPA was unable to justify imposing any specific BTA technology requirements on facilities below the applicable flow threshold or any uniform application requirements for entrainment for facilities with "actual intake flows"[47] at or below 125 MGD. Yet Region 10

[47] Actual Intake Flow ("AIF") "means the average volume of water withdrawn on an annual basis by the cooling water intake structures over the past three years. After October 14, 2019, Actual Intake Flow means the average volume of water withdrawn on an annual basis by the cooling water intake structures over the previous five years. Actual intake flow is measured at a location within the cooling water intake structure that the Director deems appropriate. The calculation of actual intake flow includes days of zero flow. AIF does not include flows associated with emergency and fire suppression capacity." 40 C.F.R. § 125.92(a).

proposes to impose a host of new § 316(b) requirements without identifying the technologies on which they are based, determining that they are in fact available for the facilities in question, and evaluating their costs and benefits. In particular, the Region failed to consider the important social costs (*e.g.* energy reliability, renewable electricity generation) of imposing new requirements.

In fact, it would be very difficult for many hydroelectric facilities to comply with the requirements outlined in the Proposed Permit. In some cases (*e.g.*, weekly monitoring, returning impinged fish to source water), the requirements Region 10 has proposed are far more onerous than those EPA concluded should apply only to facilities with design flows greater than 2 MGD and actual intake flows greater than 125 MGD. Moreover, even if some facilities could meet some of those requirements, the costs likely would far exceed any plausible environmental benefits.

UWAG and NHA provide the following specific comments on the Proposed Permit's BTA requirements:

- The 2014 Rule establishes requirements for existing facilities that: (1) have NPDES permits, (2) use one or more CWISs with a cumulative DIF of greater than 2 MGD to withdraw water from waters of the U.S., **and** (3) use 25 percent or more of the water withdrawn (on an actual intake flow basis) exclusively for cooling water purposes. 40 C.F.R. § 125.91(a). Facilities with CWISs that are subject to CWA § 316(b) that do not meet these criteria must meet § 316(b) requirements established by the permit writer on a case-by-case, BPJ basis. *Id.* § 125.90(b). The Fact Sheet and Section 401 Water Quality Certification state that the Proposed Permit would cover facilities that fall below the threshold of "2 MGD or less **and** less than twenty-five percent used exclusively for cooling . . . ." Proposed Permit Fact Sheet at 28 (emphasis added); *see also* Section 401 Water Quality Certification at 1. The Proposed Permit, however, states that facilities are ineligible for coverage and must apply for an individual NPDES permit if the facility "uses or proposes to use one or more [CWISs] with a [DIF] of greater than 2 [MGD] **or** the facility uses 25 percent or more of the water it withdraws for cooling water purposes on an average monthly basis." Proposed Permit at 8 (emphasis added). Although, as explained throughout these comments, NHA and UWAG do not believe CWA § 316(b) or the 2014 Rule are applicable to hydroelectric facilities even on a case-by-case BPJ basis, if Region 10 plans to rely on the 2014 Rule, it must be consistent throughout the

Proposed Permit and supporting documents, and clarify that facilities that are ineligible for coverage under the Proposed Permit are those facilities that use greater than 2 MGD **and** use 25 percent or more of the water for cooling purposes.

- 2(a): The Proposed Permit would require permittees to "manage the intake operations to minimize injury to resident fish and other aquatic species in the river," but the Region provides no analysis of the range of existing hydroelectric cooling water intake operations and how their operations could be managed to minimize injury to resident fish and other aquatic species.

- 2(b): The Proposed Permit would require facilities to "manage tailrace operations to prevent fish access to the draft tube areas to minimize injury of fish and other aquatic species." The tailrace and draft tube, however, are not subject to EPA's NPDES permitting authority. Moreover, the cooling water piping may not exist in the draft tube, but rather at the downstream face of the power plant, making managing the tailrace operations at the draft tube ineffective for protecting fish. Because of the geometry and physics of this system, the potential for fish impingement and entrainment is very low, and monitoring for fish is nearly impossible. To the extent that fish access to the tailrace and associated injury from contact with turbine runners constituted a significant resource issue, the existing FERC licensing process would be adequate to fully address the impacts in consultation with fish and wildlife agencies.

- 2(c): The Proposed Permit would require permittees to "cease or reduce the intake of cooling water whenever withdrawal of source water is not necessary," but the Region provides no analysis of, or evidence for, the feasibility or efficacy of ceasing or reducing the intake of cooling water at these hydroelectric facilities.

- 2(d): The Proposed Permit would require permittees to "return all observed live impinged fish to the source water to the extent practicable." The Region provides no analysis that impingement occurs, or can even be discerned, at all types of cooling water intakes or that screening fish and returning fish to the source water is technically feasible.

- 2(e): The Proposed Permit directs permittees not to spray impinged fish or invertebrates with chlorinated water. EPA provides no analysis of, or evidence for, the feasibility or efficacy of restricting the use of chlorinated water at hydroelectric cooling water intakes for minimizing adverse effects of impingement and entrainment.

- 2(f): The Proposed Permit would require permittees to "design an impingement and entrainment monitoring program," and the monitoring is to be conducted "at least weekly." However, as explained above, conducting impingement or entrainment sampling at the pipe or structure taking in cooling water would be very difficult, and even unsafe. Moreover, in the FERC licensing process, study and monitoring needs are determined in consultation with federal and state fish and wildlife agencies. The FERC process is robust and sufficient for determining whether monitoring may be justified and is technically feasible for evaluating fish impingement and entrainment at the cooling water intake.

- 2(g): The permittee is directed to retain the results of this monitoring program on site "for inspection and for submission to EPA as required in Part 4(l) of this Section," but the reference to 4(l) is confusing, given this section (*i.e.*, IV.C) contains no Part 4(l).

- 2(h): The Proposed Permit would require permittees to maintain physical screening or exclusion technology consistent with the guidelines of NMFS Northwest Region's Anadromous Salmonid Passage Facility Design. These guidelines, however, are designed based on physical screening and exclusion technology for the hydroelectric turbines and the bypass operations and are not likely to be feasible at many of the cooling water intakes. Region 10 could not require such technologies for the turbines themselves, which are outside the scope of EPA's NPDES authority.

- 2(i): The Proposed Permit would require the permittee to "operate and maintain the CWIS including any existing technologies used to minimize impingement and entrainment," but it is not clear what technologies could be used at hydroelectric facilities to minimize impingement and entrainment. The Region provides no analysis or explanation.

The information report required under the Proposed Permit's section IV.C.3 has requirements that are excessive and, in some instances, inconsistent with the section IV.C.2 BTA requirements. UWAG and NHA provide the following specific comments on the Proposed Permit's CWIS report requirement:

- 3(d): Reporting requirement 3(d) refers to measures to be taken to maintain a daily maximum surface withdrawal of 1.0 MGD, but such measures are not listed among the BTA requirements.

- 3(e): EPA requests maximum monthly average intake data during the previous five years, but these data may not be collected at hydroelectric cooling water intakes because the intake volume is so small.

- 3(f): Reporting requirement 3(f) refers to whether the facility withdraws cooling water at a rate commensurate with a closed-cycle cooling system without any analysis or explanation as to how this might be relevant to the operation of small cooling water intakes at hydroelectric facilities.

- 3(o): Reporting requirement 3(o) for a report of the five-year results from the impingement and monitoring program called for in Part 2(f) is not supported by any analysis of the need for, technical feasibility, or costs of conducting such a monitoring program. Again, monitoring would not be technically feasible at many facilities, and EPA has not identified how the monitoring information would be applied to future BTA determinations.

VII. EPA Should Clarify Certain Other Requirements in the Proposed General Permit.

In addition to the § 316(b)-related measures addressed above, there are a number of discharge-related provisions in the Proposed Permit that require clarification and/or revision, including the following:

- Eligibility for Permit Coverage: On page 8, the Proposed Permit states that a facility is ineligible for coverage if "[t]he facility is new or has expanded since July 1, 2011." The Fact Sheet states, however, that facilities are not covered by the Proposed Permit if they "are new or have expanded *their discharge* since July 1, 2011." Fact Sheet at 19 (emphasis added). EPA should clarify whether a facility is excluded if it has expanded since July 1, 2011, or whether it is excluded only if the discharge has expanded since July 1, 2011. Similarly, the Proposed Permit states that a facility would be ineligible when "[a] Water Quality Management Plan or Total Maximum Daily Load (TMDL) containing requirements applicable to such a point source is approved," Proposed Permit at 8, but the Fact Sheet states that this applies to facilities "with wasteload allocations from a TMDL for pH, oil, and grease and/or temperature" would be ineligible. Fact Sheet at 19. EPA should clarify whether a facility is ineligible if it has a wasteload allocation as a result of a TMDL for some, but not all of the discharges, or whether a facility could be eligible for only those discharges that do not already have an approved wasteload allocation.

- Existing Measures to Prevent Release of Oil and Grease: In accordance with their FERC license and related requirements, most hydropower producing facilities in the state of Idaho are currently required to maintain procedures in place pursuant to a Spill Prevention Control and Countermeasure (SPCC) and Emergency Action Plan (EAP). Each of these plans is in place in order to protect against any accidental release of oil and grease into a water of the United States. It is unclear, therefore, what additional benefit would derive from the Proposed Permit's Best Management Practices (BMP) Plan requirement.

- BMP Plan Notification: Under the Proposed Permit's "Schedule of Submissions," the permittee must provide EPA with written notification that the BMP Plan has been implemented within 180 days after the effective date of the permit. Proposed Permit at 2. This schedule also indicates that the permittee must notify EPA that the BMP Plan has been implemented within 90 days after authorization to discharge under the General Permit. *Id.* Can EPA guarantee that the permittee will have authorization to discharge within 90 days of the effective date of the permit to allow the permittee to satisfy these obligations on time? Moreover, the 180-day period specified on page 2 of the Proposed Permit is inconsistent with the requirement on page 20 that the permittee submit written notice to EPA and IDEQ that the BMP Plan has been developed and implemented within 90 days of the effective date of the permit. EPA should correct page 20 to use the 180-day period previously specified.

- BTA Notification: Likewise, pursuant to section IV.C.2, facilities withdrawing cooling water must implement BTA within 180 days of the effective date of the permit. Proposed

Permit at 20. Can EPA guarantee that the permittee will have authorization to discharge within enough time to implement BTA within 180 days of the permit's effective date?

- BMP Plan Shield: Part IV.B.5 of the proposed permit would require the permittee to implement BMPs or other measures that "ensure" compliance with a host of vaguely or inconsistently stated objectives. For example, Section IV.B.5(a) would require BMPs to "ensure" that oil, grease, and hydraulic fluids from "all sources" "do not enter the river," apparently in any amount, and regardless whether this would be feasible or necessary to meet water quality standards. Proposed Permit at 21. Yet, section IV.B.5(c) would require only BMPs that "*minimize* the leaking of hydraulic oil or other oils." *Id.* (emphasis added.) As another example, section IV.B.5(d) would require the permittee to "reduce" its reliance on lubricants that come into contact with river water, and sections IV.B.5(e) and IV.B.5(j) would require a "preference" for "environmentally acceptable lubricants" and PCB-free lubricants, paint, and caulk, but no criteria are specified in the permit for evaluating what reductions are required or for exercising these preferences. *Id.* at 21-22. Requirements such as these leave permittees unfairly exposed to agency enforcement actions and citizen suits even when the permittees have complied with them in good faith. To prevent this, the requirements should be stated more clearly and objectively, and the permit should include a provision that a permittee's compliance with the BMPs specified in its required BMP Plan constitutes compliance with section IV.B of the permit. Such a "plan shield" would be consistent with NPDES permit requirements because section IV.B.3(c) authorizes EPA to require changes in the BMP Plan "at any time" if EPA determines that the BMP Plan does not meet the minimum requirements of section IV. But allowing a permittee to rely on the BMPs in its BMP Plan unless and until EPA directs changes in those BMPs would prevent the permittee from being unfairly subject to an enforcement action based on second-guessing the adequacy of the BMPs that it has selected in good faith to comply with the permit's vaguely worded BMP requirements.

- NOI Requirements for Facilities Discharging to § 303(d) Listed Waters: According to the Proposed Permit, facilities that would like coverage under the general permit must submit their initial application or Notice of Intent ("NOI") within 90 days after the effective date of the permit. Proposed Permit at 2. On page 12, item 15, however, applicants discharging to waters listed on IDEQ's most recent CWA § 303(d) list for temperature must submit one complete season (May 1 through November 1) of continuous temperature monitoring data with a copy of their NOI. Facilities that discharge to § 303(d) listed waters for temperature will likely not be able to submit an NOI with one complete season of continuous temperature monitoring data within 90 days after the effective date of the permit. It would make more sense for facilities to begin this sampling once the permit becomes effective. EPA should clarify that such facilities can submit this sampling information after the sampling period has concluded or when the permit is renewed. If this requirement is not adjusted, several facilities in Idaho that would otherwise qualify for coverage under the Proposed Permit would not be eligible. In addition, there is a lack of detail in the Proposed Permit and the Section 401 Water Quality Certification regarding where the monitoring should occur and the sampling intervals. EPA should provide more information on these requirements.

- Effluent Limits Apply Only to Pollutants Added by the Facility: Sections III.A.1-6 of the Proposed Permit would prohibit the "discharge" of various materials that would impair beneficial uses or cause other adverse effects in the receiving water. Proposed Permit at 14. In addition, sections III.A.8-12, Tables 1-5, set forth numeric limits that would apply to the facility's "effluent." *Id.* at 14-17. Consistent with EPA's longstanding position, the Proposed Permit should be revised to clarify that these prohibitions apply only to pollutants that are *added* to receiving waters by the facility, and not to pollutants that are *passed through* the facility from upstream waters, including pollutants contained in facility reservoirs.

- Sampling Frequency: The Proposed Permit delineates four types of discharges that must be sampled, some on a monthly basis. Proposed Permit at 15-17. Monthly sampling is not needed, and there are limited benefits, if any, associated with the extensive sampling scheme proposed. Indeed, the 2009 Region 1 general permit for hydroelectric facilities requires less frequent sampling for similar discharges. For example, whereas the Proposed Permit requires sampling for flow, pH, and oil and grease for cooling water once per month, the Region 1 permit requires sampling once per quarter.[48]

  EPA Region 1 initially proposed monthly sampling, but UWAG and NHA noted in their 2004 joint comments[49] on the Region 1 proposal that monthly sampling is not needed and that there are limited benefits, if any, associated with the extensive sampling scheme Region 1 proposed. UWAG and NHA explained that many of the activities proposed to be regulated under the general permit are periodic in nature and may occur only once or twice a year and, therefore, monthly monitoring would be wasteful. *Id.* at 9. We also noted that obtaining monthly samples could present a substantial logistical challenge to owners and operators due to extreme weather conditions, sample holding time, and lab accessibility. Data that NHA and UWAG member organizations acquired during the FERC licensing process show that the sample results would be well below the discharge limitations that were proposed by Region 1. Region 1 recognized these concerns and, in the final 2009 Region 1 permit, EPA reduced the sampling frequency. In its Response to Comments on the Region 1 permit, EPA stated that it "determined a less frequent monitoring frequency will still provide adequate pollutant monitoring data...."[50]

  Region 10 has provided no principled basis for requiring sampling more frequently than Region 1 determined was sufficient in the 2009 Region 1 general permit. We recommend that Region 10 reduce the sampling frequencies to, at the very least, align with the sampling frequencies that Region 1 determined to be reasonable in the 2009 Region 1 general permit.

---

[48] *See* EPA Region 1 General Permits Under the NPDES for Hydroelectric Generating Facilities, Permit Nos. MAG360000 and NHG360000, at 3-4, 6 (Nov. 10, 2009) ("Region 1 Permit").

[49] Joint Comments of NHA and UWAG on the Draft NPDES General Permits MAG360000 and NHG360000 for Hydroelectric Generating Facilities, at 9-10 (Jan. 16, 2004).

[50] EPA Region 1 General Permit Response to Comments NPDES General Permit Nos. MAG360000 and NHG360000, at 42. ("Region 1 Response to Comments").

- Flood/High Water Discharges: The Proposed Permit would impose effluent limitations and monitoring for maintenance-related water during flood/high water events and for equipment-related backwash strainer water. Proposed Permit at 16. In the Region 1 permit, however, EPA recognized that "sampling discharges from emergency flood devices can be dangerous and impracticable," and determined that the monitoring and reporting requirements it had proposed for the flood water discharges were "inappropriate." *See* Region 1 Response to Comments at 19. As a result, the Region 1 permit required only limited monitoring and reporting for facility maintenance-related water during flood/high water events and did not require monitoring for equipment-related backwash strainer water. Region 1 Permit at 6. Region 10 should make similar adjustments to the Proposed Permit.

- Monitoring Adjustment Opportunity: The Region 1 Permit allows for the permittee to request a reduction in the monitoring frequency of any pollutant after 10 valid pollutant samples for the outfall indicate compliance with the pertinent permit limits or demonstrate no reasonable potential to cause or contribute to water quality standards violation. Region 1 Permit at 23. We recommend that EPA revise the Proposed Permit to include the same adjustment opportunity.

- BMP Incident: Under section IV.B.6, facilities must prepare a written report to EPA and IDEQ within seven days after a "BMP incident" has been addressed. However, this term is not defined in the permit. Proposed Permit at 22. EPA should define "BMP incident."

- Toxic Substances v. Toxic Pollutants: Pursuant to section III.A.2, the permittee must not discharge "toxic substances" in concentrations that impair the designated beneficial uses of the receiving water. Proposed Permit at 14. Also, section V.I addresses "Changes in Discharge of Toxic Substances." *Id.* at 29. EPA should clarify whether "toxic substances" are equivalent to "toxic pollutants" as defined in 40 C.F.R. § 122.2.

- "Deleterious Materials": Similarly, section III.A.3, Proposed Permit at 14, and section V.G.5, *id.* at 29, refer to "deleterious materials," but these materials are not defined. These terms should also be defined.

- Total Suspended Solids (TSS) Levels: The Proposed Permit requires a monitoring method that will achieve a maximum Minimum Level for TSS of 5 mg/L. But there is no monitoring requirement for TSS, and EPA acknowledges that TSS is naturally occurring. Proposed Permit at 17, 45. EPA must explain the basis for such a requirement. In the Region 1 general permit for hydroelectric facilities, for example, this issue was resolved by removing the requirement to monitor TSS.

- "Maximum Minimum Level": The table in Appendix A lists the "maximum Minimum Level (ML)" for pollutants in the permit. Proposed Permit at 45. EPA must clarify how facilities should apply this standard.

- "Significant": Appendix C uses the term "significant" in multiple places to describe what must be included in the BMP Plan, but the term "significant" is not defined in the

Proposed Permit. EPA should clarify the factors that will be used to determine when a spill, event, or some other occurrence is "significant."

VIII. Conclusion

In sum, EPA Region 10 should not apply CWA § 316(b) to hydropower facilities. Section 316(b) was intended by Congress to address CWIS at steam electric and similar facilities, not hydropower projects. Furthermore, EPA CWIS regulations do not call for application of § 316(b) to hydropower facilities, and those regulations were not developed with any consideration of doing so, making it highly inappropriate for Region 10 to seek to impose the regulations or elements of them on the facilities. As noted above, the FPA and CWA § 401 fully protect both water quality and fish and wildlife in the context of hydropower facilities. Therefore, Region 10 should remove any § 316(b)-related provisions from the Proposed Permit.

UWAG and NHA appreciate the opportunity to comment on the Proposed Permit and provide factual information regarding operation of our members' hydroelectric facilities. No commenter, however, can make up for the lack of a comprehensive administrative record in the first instance that provides the Agency's evaluation of the availability and feasibility of potential technologies for hydroelectric facilities. We hope that EPA will pursue our recommendations and we look forward to working with you to address these meaningful issues.

Appointment

From: Tovar, Katlyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=149c0f312d2c48cf91809d6edf01f904-Tovar, Katl]
Sent: 3/4/2019 4:59:28 PM
To: Segal, Scott [scott.segal@bracewell.com]; ssnyder@ingaa.org; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Wyman, Christine [christine.wyman@bracewell.com]; dduncan@hunton.com
CC: Owscheduling [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=04524cfb1f2a47809712c095e35707f3-Owschedulin]; emily.seattle[Personal Email / Ex. 6]/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=64b6184cd90a4d58a2c3f23d1a04b466-emily.seatt]; Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]

Subject: Discussion on 401(g)
Attachments: Real ID Information.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700 or 202-564-3318 for escort

Start: 3/18/2019 8:30:00 PM
End: 3/18/2019 9:00:00 PM
Show Time As: Busy

POC: Christine Wyman
Ph: 202.828.5801

Attendees:
Christine Wyman
Scott Segal
Sandra Snyder
Deidre Duncan

Message

From: Jonathan Gledhill [jgledhill@policynavigation.com]
Sent: 3/15/2018 11:05:36 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
Subject: No contact with Al

David, he asked me for my schedule yesterday and today but never heard from him. Please let me know how I can help. Best wishes,

Jonathan Gledhill
President
Policy Navigation Group
703-280-0430

Appointment

From: Tovar, Katlyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=149c0f312d2c48cf91809d6edf01f904-Tovar, Katl]
Sent: 3/4/2019 4:59:28 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Wyman, Christine [christine.wyman@bracewell.com]; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Segal, Scott [scott.segal@bracewell.com]; ssnyder@ingaa.org; dduncan@hunton.com
CC: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Owscheduling [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=04524cfb1f2a47809712c095e35707f3-Owschedulin]; emily.seattle@gmail.com [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=64b6184cd90a4d58a2c3f23d1a04b466-emily.seatt]

Subject: Discussion on 401(g)
Attachments: Real ID Information.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700 or 202-564-3318 for escort

Start: 3/18/2019 8:30:00 PM
End: 3/18/2019 9:00:00 PM
Show Time As: Busy

POC: Christine Wyman
Ph: 202.828.5801

Attendees:
Christine Wyman
Scott Segal
Sandra Snyder
Deidre Duncan

Message

From: Don Parrish [donp@fb.org]
Sent: 10/12/2018 10:04:56 PM
To: Northey, Bill - OSEC, Washington, DC [Bill.Northey@osec.usda.gov]
CC: Aguero, Michael - OSEC, Washington, DC [Michael.Aguero@osec.usda.gov]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; CloverAdams, Jamie - OSEC, Washington, DC [Jamie.CloverAdams@osec.usda.gov]; Fisher, Andrew D - Washington, DC [Andrew.Fisher@osec.usda.gov]
Subject: Re: Meeting Request - Nutrient Loss

Thanks Bill - I will work with Michael next week.

Don

Sent from my iPhone

On Oct 12, 2018, at 5:20 PM, Northey, Bill - OSEC, Washington, DC <Bill.Northey@osec.usda.gov> wrote:

> Don,
> Please work with Michael to set up a meeting. I'd be quite interested in hearing your suggestions.
> Thank you,
> Bill
>
> Bill Northey
> USDA Under Secretary
> Farm Production and Conservation: Natural Resources Conservation Service,
> Farm Service Agency, Risk Management Agency
>
> Executive Asst:
> Michael Aguero
> Michael.Aguero@usda.gov
> 202-260-3276
>
> **From:** Don Parrish <donp@fb.org>
> **Sent:** Friday, October 12, 2018 4:49 PM
> **To:** Northey, Bill - OSEC, Washington, DC <Bill.Northey@osec.usda.gov>
> **Subject:** Meeting Request - Nutrient Loss
>
> Bill
>
> I would like to request a meeting to discuss USDA's role in nutrient loss reduction strategies. Farm Bureau, The Fertilizer Institute, and two representatives from the Ag nutrient policy council would like to discuss the following topics with you, Anna Wildeman and David Ross from EPA.
>
> - Major opportunity for USDA leadership in nutrient loss
> - Explore opportunities to implement nutrient loss reduction practices using Farm Bill programs and

- Using USDA's leadership to engage state and local groups to aid in implementation of an overall nutrient strategy

If possible, I would like to suggest we can find time to meet before November 4th. Thanks and I look forward to hearing from you.

Don R. Parrish
American Farm Bureau Federation
donp@fb.org
202-406-3667

Message

From: Dave Ross Personal Email / Ex. 6
Sent: 6/30/2018 9:35:43 AM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
Subject: Fwd: Yes on Pruitt et al

Forward to work account.

Dave Ross
Personal Phone / Ex. 6

Begin forwarded message:

> **From:** "Bennett, Tate" <Bennett.Tate@epa.gov>
> **Date:** June 27, 2018 at 10:24:06 AM EDT
> **To:** "Ford, Hayley" <ford.hayley@epa.gov>
> **Cc:** "Penman, Crystal" <Penman.Crystal@epa.gov>, David Ross Personal Email / Ex. 6 "Forsgren, Lee" <Forsgren.Lee@epa.gov>, "Wildeman, Anna" <wildeman.anna@epa.gov>
> **Subject: Re: Yes on Pruitt et al**
>
> Great! Thanks and sorry for the duplicative email.
>
> On Jun 27, 2018, at 9:10 AM, Ford, Hayley <ford.hayley@epa.gov> wrote:
>
> > Already talked with her earlier and Dave is coming!
> >
> > *Hayley Ford*
> > Deputy White House Liaison and Personal Aide to the Administrator
> > Environmental Protection Agency
> > ford.hayley@epa.gov
> > Phone: 202-564-2022
> > Personal Phone / Ex. 6
> >
> > **From:** Bennett, Tate
> > **Sent:** Wednesday, June 27, 2018 10:09 AM
> > **To:** Penman, Crystal <Penman.Crystal@epa.gov>
> > **Cc:** Ford, Hayley <ford.hayley@epa.gov>; David Ross Personal Email / Ex. 6 Forsgren, Lee <Forsgren.Lee@epa.gov>; Wildeman, Anna <wildeman.anna@epa.gov>
> > **Subject:** Fwd: Yes on Pruitt et al
> >
> > Hi Crystal! Are Dave, Anna or Lee by chance available to join the Admin for this meeting with the Farm Bureau presidents at EPA on July 11 at 10:30 AM on WOTUS?
> >
> > Begin forwarded message:
> >
> > > **From:** "Ford, Hayley" <ford.hayley@epa.gov>
> > > **Date:** June 27, 2018 at 8:47:03 AM CDT
> > > **To:** Don Parrish <donp@fb.org>
> > > **Cc:** "Bennett, Tate" <Bennett.Tate@epa.gov>, "Woodward, Cheryl"

<Woodward.Cheryl@epa.gov>
Subject: RE: Yes on Pruitt et al

Hello Don,

July 11 from 10:30-11 works for us! We look forward to it. I've copied Cheryl Woodward here who can send you arrival instructions. Can you also send a list of all attendees to us? You may have already sent to Tate/discussed with her, so if so, no worries and we can get from her.

Thank you and we'll see you then!

Hayley Ford
Deputy White House Liaison and Personal Aide to the Administrator
Environmental Protection Agency
ford.hayley@epa.gov
Phone: 202-564-2022
Personal Phone / Ex. 6

From: Bennett, Tate
Sent: Tuesday, June 26, 2018 5:28 PM
To: Don Parrish <donp@fb.org>
Cc: Ford, Hayley <ford.hayley@epa.gov>
Subject: Re: Yes on Pruitt et al

Yes! Thanks for getting back to us. Adding Hayley who can confirm what is best for that day.

On Jun 26, 2018, at 4:22 PM, Don Parrish <donp@fb.org> wrote:

> Tate
>
> Can we suggest the following windows of times for Administrator Pruitt and/or David Ross.
>
> On July 10 – 8am to 8:30 or 11 am to 11:30;
>
> Or
>
> July 11 10:30 to 11

If these times do not work, let me know
and we will try again.

Don

Message

From: Keenan, Dru [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=9525DC06E2E74BB89DA45F7E19B2E0CA-KEENAN, DRU]
Sent: 5/21/2018 9:47:35 PM
To: Mann, Rachel [rkmann@hunton.com]
CC: McGrath, Kerry L. [KMcGrath@hunton.com]; loren.moore@deq.idaho.gov; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: RE: UWAG Request for Extension of Comment Period for Idaho General Permit for Hydroelectric Facilities

Dear Ms. Mann,

The EPA is receipt of the Utility Water Act Group's request for an extension to the public comment period for the Draft General Permit for Hydroelectric Facilities in Idaho. We received a similar request from Idaho Power Co. In response to Idaho Power's request, we are granting an extension to the comment period. We are extending the deadline to submit comments to June 26, 2018. The original comment period was for 45 days; with this extension, we are now providing a 60 day comment period.

The EPA will put a notice in the Federal Register extending the comment period. We are also notifying our distribution list and putting the extension on our Website.

Best regards,
Dru
Druscilla M. Keenan
U.S. EPA Region 10
1200 6th Ave Suite 900 M/S 155
Seattle, WA 98101
keenan.dru@epa.gov
206-553-1219

From: Mann, Rachel [mailto:rkmann@hunton.com]
Sent: Monday, May 21, 2018 2:35 PM
To: Keenan, Dru <keenan.dru@epa.gov>
Cc: McGrath, Kerry L. <KMcGrath@hunton.com>; loren.moore@deq.idaho.gov; Ross, David P <ross.davidp@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Sawyers, Andrew <Sawyers.Andrew@epa.gov>; McDonough, Owen <mcdonough.owen@epa.gov>
Subject: UWAG Request for Extension of Comment Period for Idaho General Permit for Hydroelectric Facilities

Please see the attached request for extension.

HUNTON
ANDREWS KURTH

Rachel Mann
Senior Professional Assistant
rkmann@HuntonAK.com
p 202.955.1606

Hunton Andrews Kurth LLP

2200 Pennsylvania Avenue, NW
Washington, DC 20037

HuntonAK.com

Message

From: Mann, Rachel [rkmann@hunton.com]
Sent: 5/21/2018 9:34:56 PM
To: Keenan, Dru [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9525dc06e2e74bb89da45f7e19b2e0ca-Keenan, Dru]
CC: McGrath, Kerry L. [KMcGrath@hunton.com]; loren.moore@deq.idaho.gov; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: UWAG Request for Extension of Comment Period for Idaho General Permit for Hydroelectric Facilities
Attachments: UWAG Extension Request for Idaho GP for Hydro 5-21-18_69533993_3-c.PDF

Please see the attached request for extension.

HUNTON
ANDREWS KURTH

Rachel Mann
Senior Professional Assistant
rkmann@HuntonAK.com
p 202.955.1606

Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

HuntonAK.com

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ANDREWS KURTH

HUNTON ANDREWS KURTH LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

KERRY L. MCGRATH
DIRECT DIAL: 202 • 955 • 1519
EMAIL: kmcgrath@HuntonAK.com

FILE NO: 29142.060067

May 21, 2018

Via E-Mail

Ms. Dru Keenan
Office of Water and Watersheds
U.S. EPA Region 10
1200 Sixth Avenue
Suite 155, OWW-191
Seattle, WA 98101
keenan.dru@epa.gov

Re: Request for 30 Day Extension of Comment Period for EPA Region 10 Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within Idaho, 83 Fed. Reg. 18,555 (Apr. 27, 2018).

Dear Ms. Keenan:

The Utility Water Act Group ("UWAG") respectfully requests a thirty-day extension of the comment period on the U.S. Environmental Protection Agency ("EPA") Region 10 request for input on the Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho. 83 Fed. Reg. 18,555 (Apr. 27, 2018). Comments are currently due on June 11, 2018. UWAG requests that the comment period be extended through July 11, 2018, and that EPA promptly notify the public regarding any applicable extension.

UWAG is a voluntary, non-profit, unincorporated group of 153 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. UWAG members operate hydroelectric facilities, power plants, and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. One of UWAG's purposes is to participate on behalf of its members in EPA regulatory actions under the Clean Water Act ("CWA") and in litigation arising from those regulatory actions. UWAG's membership includes owners and operators of hydroelectric facilities that would be affected by the adoption and issuance of the Proposed General Permit.

Given extensive experience with hydroelectric utilities and NPDES permitting issues, UWAG is uniquely positioned to offer an important perspective on the Proposed General Permit. Because this proposal presents issues of first impression regarding the applicability of CWA section 316(b) to hydroelectric facilities, and, if applicable, the appropriate standards for such

facilities, additional time is warranted. In order to provide meaningful comments, we must have adequate time to consider the Proposed Permit, Fact Sheet, and Water Quality Certification and develop appropriate recommendations. Further, there do not appear to be any statutory or court ordered deadlines that would prevent EPA from granting the request to extend the comment period.

We have discussed the Proposed Permit with other stakeholders and there are similar concerns with the duration of the public comment period given the significance of the Proposed Permit. EPA will likely receive additional requests for extension of the public comment period.

We respectfully request that EPA provide an additional thirty days, through July 11, to comment on the proposed permit and notify the public as soon as possible as to the extension. Thank you for your prompt attention to this important matter.

Sincerely,

Kerry L. McGrath

cc: Loren Moore, Idaho Department of Environmental Quality (loren.moore@deq.idaho.gov)
David Ross, EPA Headquarters (Ross.davidp@epa.gov)
Lee Forsgren, EPA Headquarters (Forsgren.lee@epa.gov)
Andrew Sawyers, EPA Headquarters (Sawyers.andrew@epa.gov)
Owen McDonough, EPA Headquarters (McDonough.owen@epa.gov)

Message

From: McGrath, Kerry L. [KMcGrath@hunton.com]
Sent: 10/22/2018 5:35:53 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
CC: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Lieberman, Paige [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a7ee44223e874dd0a74b2260f3ca7ff9-Ingram, Paige]
Subject: Insights into Environmental Law & Policy Event on October 24, 2018 - Final Agenda and Speaker Bios
Attachments: Agenda, Insights into Environmental Law and Policy (Oct. 24, 2018)-c.pdf; ALG - Insights Event - Conference Speaker Bios_71058257_3 (4).docx

Dave-
We're looking forward to seeing you on Wednesday at 1 p.m. for the Insights event. Attached please find the final agenda as well as the bios we plan to use for the speakers. If you would like us to make any changes to your bio, please let me know.

Thanks,
Kerry

From: McGrath, Kerry L.
Sent: Thursday, October 11, 2018 2:08 PM
To: Ross.davidp@Epa.gov
Cc: Penman, Crystal (Penman.Crystal@epa.gov)
Subject: "Insights into Environmental Law & Policy" Event on October 24, 2018

Dave-

Thank you for agreeing to participate in the "Insights into Environmental Law & Policy: A Conversation with Key Regulators" event on October 24, 2018. The final agenda is attached. The event will be held at Hunton Andrews Kurth's offices at 2200 Pennsylvania Ave. NW in DC. We have scheduled your session to run from 1:10-2 pm. Virginia said that time worked for you, but please let me know if we need to move you to a different time. Your session will have you as the panelist/interviewee, with me as the moderator. We are flexible as to content – we're imagining a short opening statement by you, then a few Q&A's with the moderator, then a few Q&A's with the audience. Please let us know if there are any particular water-related topics you would like us to be sure to tee up. As has been the case for the last several years, the audience likely would be general counsels and in-house environmental, health and safety counsel (not exclusive to Hunton clients). We would love for you to stay for the reception following the event if you are able, but we understand you have many demands on your schedule!

I have already provided this information to Crystal as well. Crystal – please let me know if you need any additional information.

Let me know if you have any questions. Again, we really appreciate your participation!

Thanks,
Kerry

HUNTON
ANDREWS KURTH

Kerry McGrath
Partner
KMcGrath@HuntonAK.com
p 202.955.1519

bio | vCard

Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

HuntonAK.com

From: Hunton Andrews Kurth LLP [mailto:info@huntonak.com]
Sent: Wednesday, October 03, 2018 4:00 PM
Subject: You're Invited: Insights into Environmental Law & Policy: A Conversation with Key Regulators

HUNTON
ANDREWS KURTH

YOU'RE INVITED

Please join Hunton Andrews Kurth LLP for an engaging half-day discussion with key regulators from EPA and other agencies.

Insights into Environmental Law & Policy: A Conversation with Key Regulators

Wednesday, October 24, 2018
1:00–5:00 pm ET
Registration 12:30–1:00 pm

Networking Reception Immediately Following Conference
5:00–7:30 pm

Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

REGISTER NOW

Add to my calendar

Over the course of the afternoon, you will have the opportunity to hear from and engage with the current leadership of EPA and the Trump Administration on environmental and natural resource trends and future developments.

The agenda will include discussions on:

- EPA's Developments in Water and Air Quality Policies
- Waste Management and Emergency Response Developments
- The Future of NEPA and other Priorities of the Administration

Confirmed Speakers:

- **Matt Leopold**, General Counsel, US EPA
- **Mary Neumayr**, Chairperson, Council on Environmental Quality
- **David Ross**, Assistant Administrator, Office of Water, US EPA
- **Steven Cook**, Deputy Assistant Administrator, Office of Land and Emergency Management, US EPA
- **Mandy Gunasekara**, Principal Deputy Assistant Administrator, Office of Air and Radiation, US EPA

Moderators:

- **Shannon S. Broome**, Partner, Hunton Andrews Kurth
- **Samuel L. Brown**, Partner, Hunton Andrews Kurth
- **Makram B. Jaber**, Partner, Hunton Andrews Kurth
- **Kerry L. McGrath**, Partner, Hunton Andrews Kurth
- **Joseph C. Stanko**, Partner, Hunton Andrews Kurth

- **Allison D. Wood**, Partner, Hunton Andrews Kurth

Speakers

Shannon S. Broome

Partner

Hunton Andrews Kurth

Shannon Broome is a partner in Hunton's DC office and also the managing partner of our San Francisco office. Her prior experience as a chemical engineer in the oil and gas industry allows her to assist clients on issues of high technical complexity. She represents clients in a variety of manufacturing and energy sectors, including oil and gas, automotive, aerospace, chemical and paper. Shannon has been deeply involved on behalf of industry in the development of regulations that are in the process of being evaluated by the administration for potential revision and gives strategic advice to companies and trade associations on these issues. Because Shannon works closely with manufacturing and oil and gas companies on environmental compliance and permitting and has defended numerous enforcement actions, she understands how regulations are actually implemented in practice on the plant floor. She also has an active practice responding to environmental emergency releases and accidents, and though not run by the air office, is representing clients on the revisions to EPA's RMP rules.

Shannon holds a JD from the UC Berkeley School of Law and a BSChE from the University of California–Los Angeles.

Samuel L. Brown

Partner

Hunton Andrews Kurth

A former US EPA attorney, Sam brings deep knowledge and practical experience to his clients' environmental concerns, helping them address numerous issues that include day-to-day compliance, government investigations and enforcement actions.

Clients from a wide range of sectors, including general manufacturing, mining, municipal utilities, land development, electric utilities and food processing rely on Sam to advise and counsel them on a variety of issues that include permitting, compliance counseling, administrative and civil enforcement defense, internal audits, transactional due diligence and litigation.

Sam has a particular focus on water quality; wetlands; and groundwater matters under the Clean Water Act, the Safe Drinking Water Act and the Porter-Cologne Water Quality Control Act; multimedia government investigations; incident response; and enforcement actions.

Sam holds a JD from Pace University School of Law and a BA from Michigan State University.

Steven Cook

Deputy Assistant Administrator

US Environmental Protection Agency, Office of Land and Emergency Management

A former in-house counsel for LyondellBasell Industries for over 20 years, Steven now chairs the Superfund Task Force, aimed at revitalizing how the agency coordinates remediation of National Priorities List sites. In addition to heading this recently formed task force, Steven also oversees the agency's actions on chemical spills and the Superfund program.

Steven holds a JD from BYU Law School, an MBA from The University of Texas at Austin—Red McCombs School of Business, and a BS from Brigham Young University.

Mandy Gunasekara

Principal Deputy Assistant Administrator

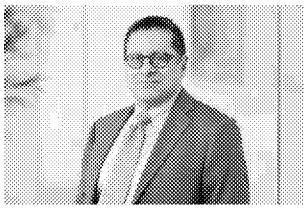
US Environmental Protection Agency, Office of Air and Radiation

Mandy joined the Environmental Protection Agency in March 2017 as a Senior Policy Advisor and previously served as Majority Counsel for Chairman Inhofe during the 114th Congress and for Chairman Barrasso during the 115th Congress on the United States Senate Environment and Public Works Committee. She led committee actions and policy development on Clean Air Act and climate change issues.

From 2012 to 2014, Mandy worked as Senior Legislative Counsel for Congressman Bob Latta (Ohio-05) where she developed the Congressman's legislative agenda on issues related to energy, environment, agriculture, immigration, labor, manufacturing and trade. She also led his committee agenda for the United States House of Representatives Energy and Commerce Committee.

Prior to joining Congressman Latta's office, Mandy worked for Ranking Member Mike Enzi on the Senate Health, Education, Labor and Pensions (HELP) Committee. While there, she worked on labor, employment and disability issues. In addition, Mandy spent two summers as a law clerk for the Energy and Commerce Committee Office of General Counsel.

A native Mississippian, Mandy earned a JD from the University of Mississippi School of Law and a BA from Mississippi College.



Makram B. Jaber

Partner

Hunton Andrews Kurth

Makram counsels and defends clients in Clean Air Act matters, drawing upon his experience as an environmental lawyer for the last 20 years and as a practicing professional engineer before that. In addition to counseling clients on meeting their obligations under the Clean Air Act, Makram helps them obtain and defend permits, defends them in enforcement actions, and represents them in rulemaking proceedings and related Court of Appeals litigation. While he has been involved in matters that run the gamut of Clean Air Act programs, he has focused primarily on the New Source Review (NSR) program and Hazardous Air Pollutants (HAPs). Makram has represented companies in numerous enforcement cases and settlements under the NSR enforcement initiative since its inception in 1999. Clients from a variety of industries from the power sector to manufacturing rely on his in-depth knowledge of the NSR program to obtain and defend permits for new and expanded facilities, to counsel them on compliance and, if necessary, defend enforcement actions for existing facilities.

Makram earned his JD at Emory University School of Law, his PhD and MS at the University of California, and his BS from the American University of Beirut.

Matt Leopold

General Counsel

US Environmental Protection Agency

Previously serving as general counsel of the Florida Department of Environmental Protection, Matt also has experience as a former attorney in the Department of Justice's Environment and Natural Resources Division. During his years of federal and state government service, and in private practice, he handled a broad range of environment and natural resource law issues and worked on complex environmental cases. He has advised two Florida Governors, the White House, and multiple state and federal agencies on environmental matters.

At DOJ, he worked on enforcement and defensive litigation, client counseling, and regulatory and policy initiatives, such as the National Oceans Policy and the U.S. Coral Reef Task Force. He was a member of the BP oil spill civil enforcement trial team formed to address the 2010 Deepwater Horizon oil spill in the Gulf of Mexico and handled cases related to the Border Fence Land Acquisition Project. He twice received the Assistant Attorney General's Award for Excellence for his work in those two matters.

Mr. Leopold worked in the Washington office of Governor Jeb Bush as a federal policy advisor on environmental matters, representing DEP and Florida's five Water Management Districts on issues they faced in Congress and with federal agencies. He represented Florida's interests to Congress during passage of the Gulf of Mexico Energy Security Act, which led to a legislative ban on new oil and gas leasing in the Eastern Gulf of Mexico.

Mr. Leopold hails from the Tampa area and is a graduate of the University of Florida and the Florida State University College of Law.

Kerry L. McGrath

Partner

Hunton Andrews Kurth

Kerry's practice focuses on permitting and litigation under CWA, ESA, NEPA and other environmental statutes. As counsel on the many significant water cases and regulatory proceedings of recent years, she represents major industry groups on key issues such as the scope of federally regulated "waters of the United States" and requirements for utilities and manufacturers under EPA's section 316(b) rule for existing facilities.

Kerry holds a JD from George Washington University Law School and a BA from Vanderbilt University.

Mary Neumayr

Chairperson

White House Counsel on Environmental Quality

Prior to CEQ, Mary Neumayr was a long-time senior counsel for the House Energy & Commerce Committee. Before moving to the Hill in 2009, Neumayr spent three years at the Department of Energy as deputy general counsel for environment and nuclear programs, and before that she was at the Department of Justice's Environment & Natural Resources division as counsel to the assistant attorney general from 2003-2006.

Mary holds a JD from the University of California, Hastings College of the Law and a BA from Thomas Aquinas College.

David Ross

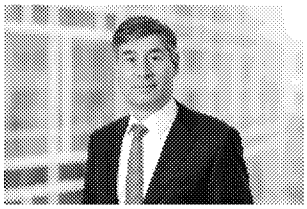
Assistant Administrator

US Environmental Protection Agency, Office of Water

Dave has more than 20 years of experience working on water issues in both state government and the private sector. Prior to joining EPA in January 2018, he worked as the Director of the Environmental Protection Unit at the Wisconsin Department of Justice. During his tenure, he served as the lead environmental prosecutor for the State of Wisconsin and worked closely with the Wisconsin Department of Natural Resources on environmental and natural resources issues.

Mr. Ross has also worked in the Wyoming Attorney General's Office representing the Water Quality Division of the Wyoming Department of Environmental Quality and as a partner in the land use and natural resources practice at an international law firm in Washington, DC. Earlier in his career, he provided project management and environmental consulting services to the City of San Diego, California, with a focus on designing, installing and testing wastewater reclamation and repurification technologies.

Mr. Ross received his JD and Masters in Environmental Law from Vermont Law School and graduated with a BA from the University of Wisconsin-Madison.



Joseph C. Stanko

Partner

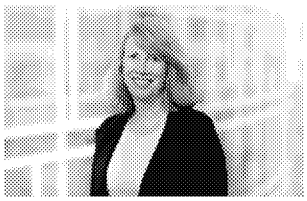
Hunton Andrews Kurth

Joe serves as head of the federal government relations team. His decades of experience provides him the knowledge and tactical experience necessary to lead an innovative and strategic practice focused on the policy issues related to global climate change, energy production, fuel regulation, renewable energy policy, the Clean Air Act and other environmental laws.

Prior to joining Hunton Andrews Kurth, Joe served as counsel to the Committee on Energy and Commerce of the US House of Representatives from 1997 to 2003. As counsel, Joe advised the chairman and Committee Members on environmental and energy legislation, climate change and homeland security issues; and conducted numerous oversight and legislative hearings. He also served as a member of US delegations to various international environmental treaty negotiations.

Earlier in his career, Joe was an analyst for the Massachusetts House Rules and Natural Resources Committees and an associate at two distinguished law firms, where he focused on environmental compliance work for corporate clients.

Joe holds a JD from Boston University School of Law and a BA from Boston University.



Allison D. Wood

Partner

Hunton Andrews Kurth

Allison has helped clients navigate complex and politically charged climate change issues, working on several precedent-setting cases, including in the US Supreme Court and several Courts of Appeals. She has been described in Chambers USA 2016 as "a terrific lawyer."

With the client's business objectives in mind, Allison assists with every facet of climate change law. She provides guidance and education on existing and forthcoming climate laws, prepares comments on proposed regulations, challenges unlawful regulations in court, and defends favorable regulations from attacks by others. She has also successfully defended companies from tort suits alleging that greenhouse gas emissions from the companies' normal business operations contribute to the "nuisance" of global climate change.

A trusted adviser to members of the C-suite and boards of directors for many companies and nonprofits, she is well known for her ability to distill complex legal issues into easily understandable terms. She is valued for her strategic insights, practical knowledge, and ability to develop solutions with the bottom line in mind.

Allison holds a JD from George Washington University Law School and a BS from California State University, Northridge.

About the Firm

Hunton Andrews Kurth LLP is a law firm created by the 2018 merger of two preeminent firms, each more than a century old: Hunton & Williams and Andrews Kurth Kenyon. With 1,000 lawyers in the United States, Asia, Europe and the Middle East, the firm serves clients across a broad range of complex transactional, litigation and regulatory matters. The combination brings together two internationally preeminent energy practices, uniting a tier one oil and gas practice with a tier one power practice. It also integrates two deep and diversified corporate and finance practices, strengthening already robust capabilities in capital markets, private equity and structured finance. The firm now has one of the largest full-service litigation practices in the country, with particular depth in the key litigation markets of Texas, California, Florida and the Mid-Atlantic. Bringing together multiple, widely recognized, industry-leading practices, including privacy and cybersecurity, intellectual property, environmental and P3, public finance and infrastructure, both legacy firms have received recognition and accolades in the league tables and rankings outlets for their work in these, and other, practice areas.

About the Environmental Practice

Hunton Andrews Kurth's environmental practice group is one of the most highly decorated practices at the firm and largest in the country. Recognized by Chambers USA as Environmental Practice Group of the Year in 2017 and designated an Environmental Group of the Year by Law360 for eight consecutive years (2010-2017), we are continually top ranked nationally and regionally by US News, Legal500 and Chambers both for our practice and our individual attorneys. With over 50 environmental attorneys, we have led numerous precedent-setting challenges in state and federal courts, including more than 40 US Supreme Court cases and hundreds of cases in the US Courts of Appeals and we continue to be thought leaders on emerging environmental issues. The environmental practice group has the experience and capability to handle the full range of environmental matters, from regulatory development and compliance to enforcement defense and transactional support. We are known for offering real-world solutions and thoughtful approaches to complex problems, and are considered the "go to" firm on environmental matters by many clients.

Hunton Andrews Kurth is proud to maintain a number of blogs following legal trends. For more on environmental topics and trends, please visit two of our blogs:

www.huntonnickelreportblog.com for the latest in environmental law trends and developments and ***www.pipelinelaw.com*** for updates on recent legal issues and analyses affecting pipeline owners, operators and manufacturers.

We are pleased to offer this annual, exceptional event to industry leaders from across the US.

We ask that attendees *refrain from posting* any materials or information regarding this event on social media.

Thank you.

Message

From: Jim Spratt [jim@magnoliastrategiesllc.com]
Sent: 9/27/2018 4:04:47 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
Subject: Re: FL 404 Stakeholder Conference Call Call in Conference Line / Ex. 6 asscode Conference Line / Ex. 6

I will join the discussion via the telephone.

Thanks much
JRS

Jim Spratt
Magnolia Strategies, LLC

Sent from my iPhone

On Sep 27, 2018, at 11:44 AM, Ross, David P <ross.davidp@epa.gov> wrote:

> I wanted to give you the names of the individuals currently attending the meeting with Mr. Ross on Friday at 1. They are:
>
> David Childs
> Adam Blalock
> Paula Cobb
> Luna Phillips
> Jeff Littlejohn
> Herschel Vinyard
> Andrew Tuner
> Brian Levey
>
> <mime-attachment.ics>
> <Real ID Information.pdf>

Appointment

From: Tovar, Katlyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=149c0f312d2c48cf91809d6edf01f904-Tovar, Katl]
Sent: 3/4/2019 4:59:28 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Wyman, Christine [christine.wyman@bracewell.com]; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Segal, Scott [scott.segal@bracewell.com]; ssnyder@ingaa.org; dduncan@hunton.com
CC: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Owscheduling [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=04524cfb1f2a47809712c095e35707f3-Owschedulin]; emily.seattle Personal Email / Ex. 6 m [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=64b6184cd90a4d58a2c3f23d1a04b466-emily.seatt]

Subject: Discussion on 401(g)
Attachments: Real ID Information.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700 or 202-564-3318 for escort

Start: 3/13/2019 6:30:00 PM
End: 3/13/2019 7:00:00 PM
Show Time As: Busy

POC: Christine Wyman
Ph: 202.828.5801

Attendees:
Christine Wyman
Scott Segal
Sandra Snyder
Deidre Duncan

Appointment

From: Tovar, Katlyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=149c0f312d2c48cf91809d6edf01f904-Tovar, Katl]
Sent: 3/4/2019 4:59:28 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Segal, Scott [scott.segal@bracewell.com]; ssnyder@ingaa.org; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Wyman, Christine [christine.wyman@bracewell.com]; dduncan@hunton.com
CC: Owscheduling [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=04524cfb1f2a47809712c095e35707f3-Owschedulin]; emily.seattle Personal Email / Ex. 6 /o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=64b6184cd90a4d58a2c3f23d1a04b466-emily.seatt]; Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Kramer, Jessica L. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7112d115592049c6b99dc721bea9eb3a-Kramer, Jes]

Subject: Discussion on 401(g)
Attachments: Real ID Information.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700 or 202-564-3318 for escort

Start: 3/18/2019 8:30:00 PM
End: 3/18/2019 9:00:00 PM
Show Time As: Busy

POC: Christine Wyman
Ph: 202.828.5801

Attendees:
Christine Wyman
Scott Segal
Sandra Snyder
Deidre Duncan

Appointment

From: Tovar, Katlyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=149c0f312d2c48cf91809d6edf01f904-Tovar, Katl]
Sent: 3/4/2019 4:59:28 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Segal, Scott [scott.segal@bracewell.com]; ssnyder@ingaa.org; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Wyman, Christine [christine.wyman@bracewell.com]; dduncan@hunton.com
CC: Owscheduling [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=04524cfb1f2a47809712c095e35707f3-Owschedulin]; emily.seattle Personal Email / Ex. 6 /o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=64b6184cd90a4d58a2c3f23d1a04b466-emily.seatt]; Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Kramer, Jessica L. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7112d115592049c6b99dc721bea9eb3a-Kramer, Jes]

Subject: Discussion on 401(g)
Attachments: Real ID Information.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700 or 202-564-3318 for escort

Start: 3/18/2019 8:45:00 PM
End: 3/18/2019 9:15:00 PM
Show Time As: Busy

POC: Christine Wyman
Ph: 202.828.5801

Attendees:
Christine Wyman
Scott Segal
Sandra Snyder
Deidre Duncan

Appointment

From: Tovar, Katlyn [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=149c0f312d2c48cf91809d6edf01f904-Tovar, Katl]
Sent: 3/4/2019 4:59:28 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Segal, Scott [scott.segal@bracewell.com]; ssnyder@ingaa.org; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Wyman, Christine [christine.wyman@bracewell.com]; dduncan@hunton.com
CC: Owscheduling [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=04524cfb1f2a47809712c095e35707f3-Owschedulin]; emily.seattle Personal Email / Ex. 6 o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=64b6184cd90a4d58a2c3f23d1a04b466-emily.seatt]; Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Kramer, Jessica L. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7112d115592049c6b99dc721bea9eb3a-Kramer, Jes]

Subject: Discussion on 401
Attachments: Real ID Information.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700 or 202-564-3318 for escort

Start: 3/18/2019 8:30:00 PM
End: 3/18/2019 9:00:00 PM
Show Time As: Busy

POC: Christine Wyman
Ph: 202.828.5801

Attendees:
Christine Wyman
Scott Segal
Sandra Snyder
Deidre Duncan

Appointment

From: Ross, David P [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=119CD8B52DD14305A84863124AD6D8A6-ROSS, DAVID]
Sent: 2/20/2019 8:40:23 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; donp@fb.org

Subject: Farm Bureau Water Advisory Committee
Location: 600 Maryland Ave SW, Washington DC 20024 Suite 1000W

Start: 2/21/2019 3:00:00 PM
End: 2/21/2019 3:30:00 PM
Show Time As: Busy

Recurrence: (none)

Appointment

From: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]
Sent: 6/28/2018 12:20:23 PM
To: Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; christine.wyman@bracewell.com; Campbell, Ann [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b8c25a0c2fb648b6a947694a8492311e-Campbell, Ann]; Goodin, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3eac342f280a4b9db4079c81f66d1913-JGoodin]
CC: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]

Subject: Meeting with Interstate Natural Gas of America Association (INGAA)
Attachments: Real ID Information.pdf; Meeting Request on 401 and Pipelines
Location: 1201 Constitution Ave NW, Washington DC 20460 3233 WJCE Please call 202-564-5700 for escort

Start: 7/24/2018 5:30:00 PM
End: 7/24/2018 6:00:00 PM
Show Time As: Busy

Don Santa, President and CEO, Interstate Natural Gas Association of America (INGAA)
Sandra Snyder, Senior Regulatory Attorney, INGAA
Scott Segal, Partner, Bracewell LLP
Christine Wyman, Senior Counsel, Bracewell LLP
Deidre Duncan, Partner, Hunton Andrews Kurth

CHRISTINE WYMAN
Senior Counsel
christine.wyman@policyres.com
T: +1.202.828.5801 | F: +1.800.404.3970

BRACEWELL LLP
2001 M Street NW, Suite 900 | Washington, D.C. | 20036-3310
policyres.com | profile | download v-card

Message

From: Segal, Scott [scott.segal@bracewell.com]
Sent: 6/11/2018 3:00:27 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
CC: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Wyman, Christine [christine.wyman@bracewell.com]; Wyleczuk-Stern, Elizabeth [elizabeth.wyleczuk-stern@bracewell.com]
Subject: Meeting Request on 401 and Pipelines

Dave – Scott Segal over at Bracewell LLP here. A belated congratulations on the new position, and a belated thanks for the great work coming out of OW on WOTUS and other topics. I work on a range of environmental issues and I look forward to working with you, particularly on the intersection between environmental policy and energy policy. If I can ever be of assistance, please let me know.

At your earliest convenience, I'd like to schedule some time for you to meet with folks representing the Interstate Natural Gas of America Association (INGAA) to discuss natural gas pipelines and permitting, and Section 401 of the Clean Water Act in particular. There have been a few recent developments in the law and policy affecting 401 implementation – namely two federal Circuit court decisions and the Administration's One Federal Decision policy. We'd like to share our ideas on how these developments can promote predictability in the Section 401 process. And of course, we were glad to see the issue mentioned in the recent Unified Agenda.

As you may know, INGAA is the trade organization advocating regulatory and legislative positions of importance to the natural gas pipeline industry in North America. It is comprised of 25 members, representing the vast majority of the interstate natural gas transmission pipeline companies in the U.S. and comparable companies in Canada. INGAA's members operate approximately 200,000 miles of pipelines.

In other meetings we've had with senior Agency officials, this 401 issue seems to have emerged as a priority. We'd like to speak to you as soon as we can. Perhaps sometime in early July? Thanks, ss/

SCOTT SEGAL
Partner
scott.segal@policyres.com
T: +1.202.828.5845 | F: +1.800.404.3970

POLICY RESOLUTION GROUP | BRACEWELL LLP
2001 M Street NW, Suite 900 | Washington, D.C. | 20036-3310
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this transmission in error, please notify the sender by reply e-mail and delete the message and any attachments.

Appointment

From: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]
Sent: 9/19/2018 5:27:15 PM
To: Smith, Greg [GLSmith@southernco.com]; Simmons, Donna [DSSimmons@tecoenergy.com]; 'Brammell, William' [William.Brammell@mosaicco.com]; Bigelow, Melanie [Melanie.bigelow@duke-energy.com]; 'Lori Killinger' [lkillinger@llw-law.com]; 'Butch Calhoun' [butch.calhoun@ffva.com]; 'Jim Spratt' [jim@magnoliastrategiesllc.com]; 'Cari L. Roth' [CRoth@deanmead.com]; 'larry.curtin@hklaw.com'; 'larry.sellers@hklaw.com'; Gettle, Jeaneanne [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d8e72aa7e1894faea44006fd9f22b637-Gettle, Jeaneanne]; Goodin, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3eac342f280a4b9db4079c81f66d1913-JGoodin]; 'Frank Bernardino' [frank@anfieldflorida.com]; 'David Goodlett' [dgoodlett@SCGC.org]; 'Emily Duda Buckley' [ebuckley@joneswalker.com]; Goss, Suzanne [GossSE@jea.com]; 'Dee Allen' [deedra.allen@mosaicco.com]; Leopold, Matt (OGC) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]; 'FL Recycling' [keyna@flrecycling.org]; 'Ryan Matthews' [ryan@peebles-smith.com]; 'adam.basford@ffbf.org'; 'Chris Emmanuel [cemmanuel@flchamber.com]; 'Frank Walker' [fwalker@flchamber.com]; 'Lee Killinger [lee.killinger@mosaicco.com]; 'Janet Price' [janet.price@rayonier.com]; 'Allison Carter' [allison@feca.com]; 'Noonan, Kevin' [KNoonan@ouc.com]; 'Holley, John' [John.Holley@fpl.com]; 'Dave R. Mica' [Micad@api.org]; 'Dale Calhoun' [dale.calhoun@floridagas.org]; 'Hull, Brittney' [BHull@packagingcorp.com]; hvinyard@foley.com; 'Eric M. Shea [Eric.M.Shea@fpl.com]; 'Ernie Barnett' [barnett@floridawaterandland.com]; 'gaston_cantens@floridacrystals.com'; 'BBevis@aif.com'; 'Martell, Daniel' [Daniel.Martell@fpl.com]; Steverson, Jon [jsteverson@foley.com]; Fotouhi, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=febaf0d56aab43f8a9174b18218c1182-Fotouhi, Da]; 'Jeff Littlejohn' [jeff@littlejohnmann.com]; 'Susan Harbin' [sharbin@fl-counties.com]; 'Nancy Stephens' [nancy@ Personal Email / Ex. 6 Adam Blalock [AdamB@hgslaw.com]; 'Kurt Spitzer' [Kurt.Spitzer@ksanet.net]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; 'Adams, Leticia M.' [Leticia.M.Adams@disney.com]; 'Munson, Gregory' [GMunson@gunster.com]; 'fearington@sostrategy.com'; Cobb, Paula [Paula.Cobb@duke-energy.com]; 'David Childs' [DavidC@hgslaw.com]; 'Rusty Payton' [rpayton@fhba.com]; 'Jerry Paul' [jpaul@capitolenergy.net]; 'William D Hunter' [billh@afcd.com]; Mohammad Jazil [MohammadJ@hgslaw.com]; 'Rebecca O'Hara' [rohara@flcities.com]; 'Robert Coker' [rcoker@ussugar.com]; 'Faletto, Jon - FishHawk' [JON.FALETTO@mosaicco.com]
CC: larry_williams@fws.gov; Kyle Scherer [kyle.scherer@sol.doi.gov]; Duncan, Deidre [dduncan@hunton.com]; ryan@psmfl.net; pepper@anfieldflorida.com; Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Turner, Andrew [aturner@hunton.com]; Wade, Alexis [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5c9fba2ef8444572a39185242b70593b-Wade, Alexis]; Frazer, Brian [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=572986d047624669891da90708433da1-Brian Frazer]; Wehling, Carrie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e3e55f11fdc7489698be69849b301da6-CWEHLING]; Mercer Fearington [fearington@sostrategy.com]; Basford, Adam [Adam.Basford@ffbf.org]; Emily Ham [emily.ham@westrock.com]; Brewster B. Bevis [BBevis@aif.com]; Dale Calhoun [dale@floridagas.org]; Charles Hood [charles.hood@rayonieram.com]; Neugeboren, Steven [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfd837ac503949a9820715b53ba921e6-SNEUGEBO]; Kupchan, Simma [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=784e0aea94a7485fa0435cc0cf5a62a5-SASHER]; Perez, Fatima [Fatima.Perez@kochps.com]

Subject: FL 404 Stakeholder Conference Call Call in Conference Line/ Ex. 6 scode Conference Line/ Ex. 6
Attachments: Real ID Information.pdf
Location: 1201 Constitution Ave NW, Washington DC 20004 3233 WJCE Please call 202-564-5700 for escort

Start: 9/28/2018 5:00:00 PM
End: 9/28/2018 6:30:00 PM

Show Time As: Busy

I wanted to give you the names of the individuals currently attending the meeting with Mr. Ross on Friday at 1. They are:

David Childs
Adam Blalock
Paula Cobb
Luna Phillips
Jeff Littlejohn
Herschel Vinyard
Andrew Tuner
Brian Levey

Message

From: Jonathan Gledhill [jgledhill@policynavigation.com]
Sent: 3/15/2018 11:05:36 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
Subject: No contact with Al

David, he asked me for my schedule yesterday and today but never heard from him. Please let me know how I can help. Best wishes,

Jonathan Gledhill
President
Policy Navigation Group
703-280-0430

Message

From: Keenan, Dru [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9525dc06e2e74bb89da45f7e19b2e0ca-Keenan, Dru]
Sent: 5/21/2018 9:47:35 PM
To: Mann, Rachel [rkmann@hunton.com]
CC: McGrath, Kerry L. [KMcGrath@hunton.com]; loren.moore@deq.idaho.gov; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: RE: UWAG Request for Extension of Comment Period for Idaho General Permit for Hydroelectric Facilities

Dear Ms. Mann,
The EPA is receipt of the Utility Water Act Group's request for an extension to the public comment period for the Draft General Permit for Hydroelectric Facilities in Idaho. We received a similar request from Idaho Power Co.
In response to Idaho Power's request, we are granting an extension to the comment period. We are extending the deadline to submit comments to June 26, 2018. The original comment period was for 45 days; with this extension, we are now providing a 60 day comment period.

The EPA will put a notice in the Federal Register extending the comment period. We are also notifying our distribution list and putting the extension on our Website.

Best regards,
Dru
Druscilla M. Keenan
U.S. EPA Region 10
1200 6th Ave Suite 900 M/S 155
Seattle, WA 98101
keenan.dru@epa.gov
206-553-1219

From: Mann, Rachel [mailto:rkmann@hunton.com]
Sent: Monday, May 21, 2018 2:35 PM
To: Keenan, Dru <keenan.dru@epa.gov>
Cc: McGrath, Kerry L. <KMcGrath@hunton.com>; loren.moore@deq.idaho.gov; Ross, David P <ross.davidp@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Sawyers, Andrew <Sawyers.Andrew@epa.gov>; McDonough, Owen <mcdonough.owen@epa.gov>
Subject: UWAG Request for Extension of Comment Period for Idaho General Permit for Hydroelectric Facilities

Please see the attached request for extension.

HUNTON
ANDREWS KURTH

Rachel Mann
Senior Professional Assistant
rkmann@HuntonAK.com
p202.955.1606

Hunton Andrews Kurth LLP

2200 Pennsylvania Avenue, NW
Washington, DC 20037

HuntonAK.com

Message

From: Dave Ross Personal Email / Ex. 6
Sent: 6/30/2018 9:35:43 AM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
Subject: Fwd: Yes on Pruitt et al

Forward to work account.

Dave Ross
Personal Phone / Ex. 6

Begin forwarded message:

> **From:** "Bennett, Tate" <Bennett.Tate@epa.gov>
> **Date:** June 27, 2018 at 10:24:06 AM EDT
> **To:** "Ford, Hayley" <ford.hayley@epa.gov>
> **Cc:** "Penman, Crystal" <Penman.Crystal@epa.gov>, David Ross Personal Email / Ex. 6 Forsgren, Lee" <Forsgren.Lee@epa.gov>, "Wildeman, Anna" <wildeman.anna@epa.gov>
> **Subject: Re: Yes on Pruitt et al**
>
> Great! Thanks and sorry for the duplicative email.
>
> On Jun 27, 2018, at 9:10 AM, Ford, Hayley <ford.hayley@epa.gov> wrote:
>
> > Already talked with her earlier and Dave is coming!
> > *Hayley Ford*
> > Deputy White House Liaison and Personal Aide to the Administrator
> > Environmental Protection Agency
> > ford.hayley@epa.gov
> > Phone: 202-564-2022
> > Cell: Personal Phone / Ex. 6
> >
> > **From:** Bennett, Tate
> > **Sent:** Wednesday, June 27, 2018 10:09 AM
> > **To:** Penman, Crystal <Penman.Crystal@epa.gov>
> > **Cc:** Ford, Hayley <ford.hayley@epa.gov>; David Ross Personal Email / Ex. 6 Forsgren, Lee <Forsgren.Lee@epa.gov>; Wildeman, Anna <wildeman.anna@epa.gov>
> > **Subject:** Fwd: Yes on Pruitt et al
> > Hi Crystal! Are Dave, Anna or Lee by chance available to join the Admin for this meeting with the Farm Bureau presidents at EPA on July 11 at 10:30 AM on WOTUS?
> >
> > Begin forwarded message:
> >
> > > **From:** "Ford, Hayley" <ford.hayley@epa.gov>
> > > **Date:** June 27, 2018 at 8:47:03 AM CDT
> > > **To:** Don Parrish <donp@fb.org>
> > > **Cc:** "Bennett, Tate" <Bennett.Tate@epa.gov>, "Woodward, Cheryl" <Woodward.Cheryl@epa.gov>
> > > **Subject: RE: Yes on Pruitt et al**
> > >
> > > Hello Don,

July 11 from 10:30-11 works for us! We look forward to it. I've copied Cheryl Woodward here who can send you arrival instructions. Can you also send a list of all attendees to us? You may have already sent to Tate/discussed with her, so if so, no worries and we can get from her. Thank you and we'll see you then!

Hayley Ford
Deputy White House Liaison and Personal Aide to the Administrator
Environmental Protection Agency
ford.hayley@epa.gov
Phone: 202-564-2022
Cell: Personal Phone / Ex. 6

From: Bennett, Tate
Sent: Tuesday, June 26, 2018 5:28 PM
To: Don Parrish <donp@fb.org>
Cc: Ford, Hayley <ford.hayley@epa.gov>
Subject: Re: Yes on Pruitt et al

Yes! Thanks for getting back to us. Adding Hayley who can confirm what is best for that day.

On Jun 26, 2018, at 4:22 PM, Don Parrish <donp@fb.org> wrote:

> Tate
>
> Can we suggest the following windows of times for Administrator Pruitt and/or David Ross.
>
> On July 10 – 8am to 8:30 or 11 am to 11:30;
>
> Or
>
> July 11 10:30 to 11
>
> If these times do not work, let me know and we will try again.
>
> Don

Message

From: Jim Spratt [jim@magnoliastrategiesllc.com]
Sent: 9/27/2018 4:04:47 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
Subject: Re: FL 404 Stakeholder Conference Call Call in Conference Line/ Ex. 6 passcode Conference Line/ Ex. 6

I will join the discussion via the telephone.

Thanks much
JRS

Jim Spratt
Magnolia Strategies, LLC

Sent from my iPhone

On Sep 27, 2018, at 11:44 AM, Ross, David P <ross.davidp@epa.gov> wrote:

> I wanted to give you the names of the individuals currently attending the meeting with Mr. Ross on Friday at 1. They are:
> David Childs
> Adam Blalock
> Paula Cobb
> Luna Phillips
> Jeff Littlejohn
> Herschel Vinyard
> Andrew Tuner
> Brian Levey
>
> <mime-attachment.ics>
>
> <Real ID Information.pdf>

Message

From: McGrath, Kerry L. [KMcGrath@hunton.com]
Sent: 7/11/2018 8:55:51 PM
To: Keenan, Dru [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9525dc06e2e74bb89da45f7e19b2e0ca-Keenan, Dru]
CC: Loren.Moore@deq.idaho.gov; Bulleit, Kristy [kbulleit@hunton.com]; Jeff Leahey (NHA) (jeff@hydro.org) [jeff@hydro.org]; 'Thomas A. Stanko' [Thomas.Stanko@cmsenergy.com]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: Joint NHA and UWAG Comments on EPA R10 General Permit for Idaho Hydros 7-11-18
Attachments: Joint NHA and UWAG Comments on EPA R10 General Permit for Idaho Hydros 7-11-18_69876736_23.PDF

Ms. Keenan:
The National Hydropower Association and the Utility Water Act Group submit the attached comments on the EPA Region 10 Proposed Issuance of NPDES General Permit for Hydroelectric Facilities Within the State of Idaho. We appreciate the opportunity to provide comment on the proposal, which we believe raises significant issues for hydropower project operators in the region and beyond.

If you have any questions about these comments or wish to discuss the issues further, please do not hesitate to contact me.

Thank you,
Kerry

HUNTON
ANDREWS KURTH

Kerry McGrath
Partner
KMcGrath@HuntonAK.com
p202.955.1519
bio | vCard

Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

HuntonAK.com

Message

From: Lee Bridgett [leeb@fb.org]
Sent: 7/19/2018 8:55:18 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
Subject: Thank You for Speaking to the American Farm Bureau Federation's Council of Presidents
Attachments: 2018.07.19 David Ross Thank You Letter.pdf

Mr. Ross,

Please see the attached letter from American Farm Bureau Federation President Zippy Duvall, thanking you for taking the time to speak at the AFBF Council of President's meeting last week.

Best Regards,

Lee Bridgett
Administrative Assistant, Public Affairs
AMERICAN FARM BUREAU FEDERATION®
600 Maryland Avenue SW, Suite 1000W
Washington, DC 20024
Phone: 202-406-3627 | Email: LeeB@fb.org | www.fb.org

Message

From: Northey, Bill - OSEC, Washington, DC [Bill.Northey@osec.usda.gov]
Sent: 10/12/2018 9:19:46 PM
To: Don Parrish [donp@fb.org]
CC: Aguero, Michael - OSEC, Washington, DC [Michael.Aguero@osec.usda.gov]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; CloverAdams, Jamie - OSEC, Washington, DC [Jamie.CloverAdams@osec.usda.gov]; Fisher, Andrew D - Washington, DC [Andrew.Fisher@osec.usda.gov]
Subject: RE: Meeting Request - Nutrient Loss

Don,
Please work with Michael to set up a meeting. I'd be quite interested in hearing your suggestions.
Thank you,
Bill

Bill Northey
USDA Under Secretary
Farm Production and Conservation: Natural Resources Conservation Service,
Farm Service Agency, Risk Management Agency

Executive Asst:
Michael Aguero
Michael.Aguero@usda.gov
202-260-3276

From: Don Parrish <donp@fb.org>
Sent: Friday, October 12, 2018 4:49 PM
To: Northey, Bill - OSEC, Washington, DC <Bill.Northey@osec.usda.gov>
Subject: Meeting Request - Nutrient Loss

Bill

I would like to request a meeting to discuss USDA's role in nutrient loss reduction strategies. Farm Bureau, The Fertilizer Institute, and two representatives from the Ag nutrient policy council would like to discuss the following topics with you, Anna Wildeman and David Ross from EPA.

- Major opportunity for USDA leadership in nutrient loss
- Explore opportunities to implement nutrient loss reduction practices using Farm Bill programs and
- Using USDA's leadership to engage state and local groups to aid in implementation of an overall nutrient strategy

If possible, I would like to suggest we can find time to meet before November 4th. Thanks and I look forward to hearing from you.

Don R. Parrish
American Farm Bureau Federation
donp@fb.org

202-406-3667

Message

From: Don Parrish [donp@fb.org]
Sent: 10/12/2018 10:04:56 PM
To: Northey, Bill - OSEC, Washington, DC [Bill.Northey@osec.usda.gov]
CC: Aguero, Michael - OSEC, Washington, DC [Michael.Aguero@osec.usda.gov]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; CloverAdams, Jamie - OSEC, Washington, DC [Jamie.CloverAdams@osec.usda.gov]; Fisher, Andrew D - Washington, DC [Andrew.Fisher@osec.usda.gov]
Subject: Re: Meeting Request - Nutrient Loss

Thanks Bill - I will work with Michael next week.

Don

Sent from my iPhone

On Oct 12, 2018, at 5:20 PM, Northey, Bill - OSEC, Washington, DC <Bill.Northey@osec.usda.gov> wrote:

> Don,
> Please work with Michael to set up a meeting. I'd be quite interested in hearing your suggestions.
> Thank you,
> Bill
> Bill Northey
> USDA Under Secretary
> Farm Production and Conservation: Natural Resources Conservation Service,
> Farm Service Agency, Risk Management Agency
> Executive Asst:
> Michael Aguero
> Michael.Aguero@usda.gov
> 202-260-3276
>
> **From:** Don Parrish <donp@fb.org>
> **Sent:** Friday, October 12, 2018 4:49 PM
> **To:** Northey, Bill - OSEC, Washington, DC <Bill.Northey@osec.usda.gov>
> **Subject:** Meeting Request - Nutrient Loss
> Bill
> I would like to request a meeting to discuss USDA's role in nutrient loss reduction strategies. Farm Bureau, The Fertilizer Institute, and two representatives from the Ag nutrient policy council would like to discuss the following topics with you, Anna Wildeman and David Ross from EPA.
>
> - Major opportunity for USDA leadership in nutrient loss
> - Explore opportunities to implement nutrient loss reduction practices using Farm Bill programs and
> - Using USDA's leadership to engage state and local groups to aid in implementation of an overall nutrient strategy
>
> If possible, I would like to suggest we can find time to meet before November 4th. Thanks and I look forward to hearing from you.
> Don R. Parrish
> American Farm Bureau Federation
> donp@fb.org
> 202-406-3667

Message

From: Mann, Rachel [rkmann@hunton.com]
Sent: 10/19/2018 7:26:17 PM
To: Papadopoulos, George [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5def9d742e6e4bbbbeebf45f13686989-Papadopoulos, George]
CC: McGrath, Kerry L. [KMcGrath@hunton.com]; jennifer.wood@state.ma.us [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7e3db25c521446edb472841f8a0236b2-jennifer.wo]; stergios.spanos@des.nh.gov [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bc76eb84e66943c1961b16d9abf7575f-stergios.spanos@des.nh.gov]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]; Wildeman, Anna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=05dd0af69bfa40429e438b7646502b99-Wildeman, A]; Sawyers, Andrew [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49214552a00b4ab7b168ec0edba1d1ac-Sawyers, Andrew]; McDonough, Owen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10a92c71b552413694fed6fa08522f4f-McDonough,]
Subject: RE: UWAG Comments on EPA Region 1 General Permit for MA and NH Hydroelectric Facilities
Attachments: UWAG Comments on EPA R1 General Permit for MA and NH Hydros 10-19-18_70931736_14-c.PDF

The full comments are attached. (I inadvertently send the wrong document.) I apologize. Thank you for your patience.

From: Mann, Rachel
Sent: Friday, October 19, 2018 3:13 PM
To: 'papadopoulos.george@epa.gov'
Cc: McGrath, Kerry L.; 'Jennifer.Wood@state.ma.us'; 'Stergios.spanos@des.nh.gov'; 'Ross.davidp@epa.gov'; 'Forsgren.lee@epa.gov'; 'Wildeman.anna@epa.gov'; 'Sawyers.andrew@epa.gov'; 'McDonough.owen@epa.gov'
Subject: UWAG Comments on EPA Region 1 General Permit for MA and NH Hydroelectric Facilities

Please see the attached comments of the Utility Water Act Group on the Region 1 proposed NPDES general permit for hydroelectric facilities in Massachusetts and New Hampshire.

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Rachel Mann
Senior Professional Assistant
rkmann@HuntonAK.com
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Washington, DC 20037

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Message

From: Lee Bridgett [leeb@fb.org]
Sent: 8/13/2018 9:16:54 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]; Leopold, Matt (OGC) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]
Subject: AFBF Comments re: WOTUS and Recodification of Preexisting Rule
Attachments: AFBF SNPRM Comment (SWANCC).pdf; AFBF SNPRM Comment (Technical).pdf

Mr. Leopold and Mr. Ross,

Please see the attached comments filed today by the American Farm Bureau Federation along with several other organizations regarding the definition of "Waters of the United States" and recodification of the preexisting rule. (Docket ID EPA-HQ-OW-2017-0203-15104).

Thank you,

Lee Bridgett
Administrative Assistant, Public Affairs
AMERICAN FARM BUREAU FEDERATION®
600 Maryland Avenue SW, Suite 1000W
Washington, DC 20024
Phone: 202-406-3627 | Email: LeeB@fb.org | www.fb.org

Message

From: Lieberman, Paige [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A7EE44223E874DD0A74B2260F3CA7FF9-INGRAM, PAIGE]
Sent: 1/28/2019 9:12:27 PM
To: McGrath, Kerry L. [KMcGrath@hunton.com]; Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
CC: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Brown, Samuel L. [SlBrown@hunton.com]
Subject: RE: Invitation to Speak at ELI-ALI event on May 2 at 1 p.m.

Hello Kerry –

Thank you for inviting Dave to be the keynote speaker at the ELI-ALI Clean Water Act event on May 2.

We are back up and running at the EPA and will get back to you once we can confirm Dave's availability for that time. Please feel free to reach out to me if you have any questions.

Best,
Paige

Paige Lieberman
Acting Director of Stakeholder Engagement
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
(202) 564-9957

From: McGrath, Kerry L. <KMcGrath@hunton.com>
Sent: Wednesday, January 02, 2019 2:17 PM
To: Ross, David P <ross.davidp@epa.gov>
Cc: Lieberman, Paige <Lieberman.Paige@epa.gov>; Penman, Crystal <Penman.Crystal@epa.gov>; Brown, Samuel L. <SlBrown@hunton.com>
Subject: Invitation to Speak at ELI-ALI event on May 2 at 1 p.m.

Dave-
Happy New Year! I hope this note finds you well. My partner, Sam Brown, is planning an **ELI-ALI *Clean Water Act: Law and Regulation*** event at the Hunton office in DC (2200 Pennsylvania Ave NW) on **May 2, 2019**. We would like to invite you to participate as the keynote speaker at the event. The keynote address is scheduled for 1-2 p.m. There are always other EPA and federal government panelists and we expect there will be again this year. The draft agenda is attached and here is a link to last year's event: https://www.ali-cle.org/course/Clean-Water-Act-Law-and-Regulation-CZ010?ondemand=ondemand.

We are open to structuring the keynote format however you prefer. You can plan to speak for 30 minutes or we can do more of a Q&A as we did for the Insights event here in November. The goal would be for you to provide an overview of the key issues and developments in OW, which will likely align with the other panels.

Please let us know if you are available to participate as they keynote speaker. We'd love to have you.

Thanks,

Kerry

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Message

From: McGrath, Kerry L. [KMcGrath@hunton.com]
Sent: 1/2/2019 7:16:49 PM
To: Ross, David P [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=119cd8b52dd14305a84863124ad6d8a6-Ross, David]
CC: Lieberman, Paige [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a7ee44223e874dd0a74b2260f3ca7ff9-Ingram, Paige]; Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]; Brown, Samuel L. [SlBrown@hunton.com]
Subject: Invitation to Speak at ELI-ALI event on May 2 at 1 p.m.
Attachments: Draft CWA ELI ALI CLE Agenda Outline.docx

Dave-
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Please let us know if you are available to participate as they keynote speaker. We'd love to have you.

Thanks,
Kerry

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Overview:

***May 2*, Day 1 (Time)**	**Day 1 (Subject)**	***May 3*, Day 2 (Time)**	**Day 2 (Subject)**
8:00am-8:45am	Registration	8:00am-8:30am	Breakfast
8:45am -9:45am	**(1) CWA Introduction** (Steve Neugeboren)	8:30am-9:45am	**(6) Stormwater and Wastewater** (Rachel)
9:45am-10:00am	Introductory Remarks	9:45-11:00am	**(7) PFAS** (Rachel)
10:00am-11:15am	**(2) WOTUS** (Meredith)	11:00am-11:15am	Networking Break
11:15am-11:30	Networking Break	11:15am-12:30pm	**(8) Cooperative Federalism and 401 Cert** (Meredith)
11:30am-12:45pm	**(3) Direct Hydrologic Connection** (Sam)	12:30pm-1:45pm	Lunch
12:45pm-2:00pm	Lunch – **Keynote** (David Ross)	1:45pm-3:00pm	**(9) CWA and Other Federal Authorities** (Sam)
2:00pm-3:15pm	**(4) Water Quality Standards** (Sam)	3:00pm-3:15pm	Networking Break
3:15pm-3:30pm	Networking Break	3:15pm-4:15pm	**(10) Ethics** (Rachel)
3:30pm-4:45pm	**(5) Enforcement** (Meredith)	4:15pm	Adjourn for Day
4:45pm	Adjourn for Day		

Day One – May 2, 2019

1. **Clean Water Act Introduction** – Steve Neugeboren (U.S. EPA, OGC)

2. **What is the Status and the Future of Waters of the United States?** (Meredith)

   The status of what is a "water of the United States" is as uncertain as ever. Different legal definitions apply in different states. There are efforts are being made by EPA and the Corps to redefine its meaning, but the agencies are facing obstacles in the courts, and the litigation is ongoing. This panel explores the status of the EPA and Corps' rulemaking efforts, the ongoing litigation, responses to this uncertainty from the states, and what practitioners should know about the current and future implications on permitting and compliance.

3. **Are Releases of Pollutants into Groundwater Prohibited by the CWA?** (Sam)

   Does the CWA prohibit the scenario where pollutants are released from a source and those pollutants eventually enter surfaces waters through groundwater migration? This question has created a torrent of conflicting commentary in the courts, including splits in the federal Courts of Appeal. This panel will explore the nuances of this legal

question, the recent court decisions, EPA's request for comment on potential rulemaking and the future EPA administrative actions, litigation trends, and the practical implications.

KEYNOTE: David Ross, Asst. Admin., Office of Water

4. **Water Quality Standards: What Does "Compliance" Mean and What Are the Challenges?** (Sam)

   Water quality standards are a fundamental pillar of the CWA. However, historically, at times, they have been underdeveloped, not fully utilized, or misapplied, depending on your perspective. This panel explores the question: what does "compliance" with water quality standards mean? The question will be examined in the context of permitting, litigation and other developments associated with nutrients, toxic pollutants, federal-state disagreements, enforcement, and other trending developments.

5. **CWA Enforcement During the Trump Administration.** (Meredith)

   Enforcement is a critical tool of CWA implementation and has traditionally been used as not only a driver for compliance, but used by third-parties to expand the scope and reach of the CWA. There has been much discussion about whether CWA enforcement is less pronounced in the Trump Administration. This panel explores whether that is correct, in part, by examining the EPA enforcement trends, the new EPA and DOJ enforcement policies, State enforcement, and the trends and developments with citizen suits.

Day Two – May 3, 2019

6. **Stormwater & Wastewater Management: The Trends and Challenges for the Private and Public Sector.** (Rachel)

   Stormwater and municipal wastewater pose unique challenges to attaining water quality and these sources have distinct regulatory frameworks under the CWA. Recent developments and various issues that are coming around the corner will create additional complications or opportunities, depending on your perspective. This panel will explore those trending issues, including the litigation and EPA actions related to stormwater runoff from impervious surfaces and the EPA and State use of residual designation authority, stormwater and wastewater permitting and the challenge of addressing water quality, and the future of the regulation of combined sewer systems in the era when their federal consent decrees are terminating, among other issues.

7. **What are PFAS, Why Do They Matter, and How Are They Regulated?** (Rachel)

   PFAS – per- and polyfluoroalkyl substances – are a class of man-made chemicals that are notoriously challenging to remediate. PFAS have received a great deal of attention lately, most recently this past summer in Parchment, Michigan, where PFAS in drinking water were found at levels 26 times higher than recommended per a federal health advisory. Congress introduced legislation to spur the removal and remediation of PFAS contamination, and EPA has increased its efforts to identify the presence PFAS in drinking water and other media. But some question whether any of this is enough. One recommendation has been to designate PFAS a contaminant under the Clean Water Act. What might this look like? And absent CWA regulation, what laws apply?

8. **Federal and State Governments: Cooperative Federalism in Action.** (Meredith)

   One constant theme of the Trump Administrative is cooperative federalism. EPA's message is that the States should be in the driver's seat to implement the CWA, with federal oversight, but not day-to-day interference. How does cooperative federalism work in the real world under the CWA, have there been real changes in the relationship between EPA and the States, and where are there friction points and trending developments. This panel explores those issues, including the use of CWA Section 401 by the States, related litigation, and potential EPA administrative actions; the potential for more States to assume the CWA Section 404 program; and state and tribal development and revisions to water quality standards, among other issues.

9. **One Piece of the Puzzle: How Does the CWA Fit With Other Federal and State Environmental Statutes?** (Sam)

   The CWA is one tool to address water quality and protection of the environment. It isn't always clear how the CWA aligns (or does not align) with the other federal and state legal authorities. How does the CWA interplay with, for instance, the federal SDWA, RCRA, and CERCLA? How do state laws on wetlands align with how they are regulated under the CWA? How do state laws on water quantity impact the ability of the CWA to regulate flow to address water quality? Recent developments demonstrate there isn't always alignment, there are implementation concerns, and there are questions about how these authorities are supposed to work together to protect the environment.

10. **Ethics.** (Rachel)